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THE NEWSMEN'S PRIVILEGE BILL

By Thomas C. Desmond*

Widespread discussion and controversy has attended the introduction in the New York State Legislature, for the fourth consecutive year, of a bill to permit reporters to protect the sources of their information.[1] This interest is easily explained, for few bills present more intriguing questions of legal and social policy than the Newsmen's Privilege Bill.

On one hand, the proposed law flies in the face of traditional concepts of privileged communications as expressed by such legal authorities as Wigmore[2] and Morgan,[3] and has been condemned by bar associations[4] and district attorneys.[5]

On the other hand, it is vigorously supported by reporters,[6]

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* Member of the Senate, State of New York; Chairman, New York State Senate Committee on Affairs of Cities. Senator Desmond is known for his sponsorship of the first state public housing law in the country, the premarital medical examination law, the state school lunch law, the state apprentice training law, the city home rule law, optional forms of county government law, urban redevelopment corporations law, simplified income tax law, and many others. He is a life trustee of Union College, life member of the Corporation (Board of Trustees) of Massachusetts Institute of Technology, member of the Visiting Committee of the Harvard University Graduate School of Engineering, and President of Phi Beta Kappa Associates.

1 See Senate Int. 939, Pr. 998 of 1946; Senate Int. 1256, Pr. 1352 of 1947; Senate Int. 2472, Pr. 2746 of 1948; and Senate Int. 141, Pr. 2241 of 1949. All of these bills have been sponsored by Senator Desmond.

2 Wigmore on Evidence, Little Brown & Co., 3d ed., Boston, p. 531.

3 See Am. L. Inst. Model Code, Foreword, pp. 7, 22-31.

4 See Report No. 17 of 1949, Committee on State Legislation of the Association of the Bar of the City of New York; Report of the New York State Bar Association Committee to Cooperate with the Law Revision Commission, Feb. 19, 1949; also Report No. 331 of 1946 of the New York County Lawyers' Association. Only lawyers' group favorable to the proposal is the Bronx County Bar Association (unnumbered report, 1949).

5 See Law Revision Commission Report, Leg. Doc. 65 (A), 1949 pp. 133-137.

6 The Newspaper Guild of New York supported the bill at a March 1, 1949, public hearing held by the Assembly Codes Committee. In an unprecedented move, the Legislative Correspondents Association at the State Capitol approved the proposal in 1948.

editors,[7] columnists,[8] radio broadcasters,[9] as well as civic organizations such as the Citizens' Union of New York,[10] and labor organizations.[11] In addition, eleven states have already adopted the proposal.[12]

Nature of the Proposal

The privilege law, in its essence, would provide that no reporter, whether for a newspaper, radio or television station, press service or magazine, need disclose in any legal proceeding, investigation, trial or hearing before any state or local agency the source of any information given him in confidence.

The most recent version of this proposal[13] adds two important qualifications: (a) the privilege is made not absolute, but conditional, for any official agency may go to the supreme court and show that disclosure is in the public interest, in which case the court can require the reporter to divulge his source, subject to an appeal to the appellate division, and (b) once a reporter claims the privilege of not divulging his source, he or his publisher cannot subsequently disclose the information as a defense in a libel suit, without written consent of the informant.[14]

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7 The New York State Society of Newspaper Editors has spearheaded the drive for the bill. Editorials for the proposal have appeared in the New York Times, New York World Telegram, New York Daily News, Rochester Democrat & Chronicle, and many others.

8 Among those favoring the proposal are Drew Pearson, Walter Winchell, and Dorothy Thompson.

9 "Radio Sources of Information Must Be Protected," by NAB Radio News Committee, National Associations of Broadcasters, Washington, D.C., 1949, pp. 1-9.

10 Report on Senate Int. 141, Pr. 2241 of 1949.

11 The N.Y.S. Federation of Labor and State CIO both approved the proposal.

12 Alabama, Arizona, Arkansas, California, Indiana, Kentucky, Maryland, Montana, Ohio, Pennsylvania, and New Jersey. Georgia has a law applying only to libel suits and a special class of informants. See Law Revision Commission Report, Leg. Doc. 65 (A), 1949, pp. 37-66 for citations.

13 Senate Int. 141, Pr. 2241 of 1949.

14 These changes, recommended by the Law Revision Commission, resulted in splitting the support for the bill. Many reporters and papers felt a conditional privilege was worse than none at all.

Historical Pattern

Since the time that John Peter Zenger[15] was jailed for publishing anti-administration stories in the early 1700s, and a reward was offered to anyone who would reveal the source of such stories, a part of the newsman's code of ethics has been a prohibition against disclosure of the sources of information. While this rule was becoming embedded in newspaper ethics, our legal system was developing a contrary set of precepts. Ordinarily, a person subpoenaed before a court, administrative agency or legislative body had to reveal all he knew about a matter at issue or risk a citation for contempt. The fact that the witness had pledged his word of honor as a gentleman not to reveal his source was not available as justification for non-disclosure. However, specific exceptions became recognized by law; these included confidences of marital partners, confessions to a clergyman, information given to a lawyer by a client seeking professional aid, and data given to a doctor by a patient.

The courts have held time and time again that, in the absence of a specific statute, newsmen have no legal authority to keep the sources of their information confidential.[16]

In *People ex. rel Mooney v. Sheriff*,[17] the court emphasized: "The policy of the law is to require the disclosure of all information by witnesses in order that justice may prevail. The granting of a privilege from such disclosure constitutes an exception to that rule." In the *Matter of Julius Grunow*,[18] the court held, "Such an immunity, as claimed by the defendant, would be far reaching in its effect and detrimental to the due administration of the law."

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15 See "Freedom of the Press," Jones, Washington Law Book Co., 1946, pp. 20-24.

16 Leading cases are People v. Durrant 116 Cal. 179, 148 Pac. 75 (1897); Ex parte Lawrence and Levings 116 Cal. 298, 48 Pac. 124 (1897); Joslyn v. People 67 Colo. 297, 185 Pac. 375 (1919); Pledger v. State 77 Ga. 242, 3 S.E. 320 (1886); Plunkett v. Hamilton 136 Ga. 72, 70 S.E. 781 (1911); People ex rel. Phelps v. Francher 2 Hun 226 (N.Y. 1874); People ex rel. Mooney v. Sheriff 269 N.Y. 291, 199 N.E. 415 (1935); In re Grunow 84 N.J.L. 235, 85 Atl. 1011 (1913); State v. Donovan 129 N.J.L. 478, 30 Atl. (2d) 421 (1943); Burdick v. U.S. (1914) 236 U.S. 79; Matter of Wayne (1914) D.C.: 4 Hawaii 475.

17 269 N.Y. 291, 199 N.E. 415 (1935).

18 84 N.J.L. 235, 85 Atl. 1011 (1913).

Nonetheless, reporters, from the time they are "cubs," struggling with the mysteries of lead sentences and inverted pyramid paragraph structure, are taught: "Keep your sources confidential." And they have gone to jail or have been fined time and time again in defense of their right to protect their informants.

When an Augusta, Ga., reporter refused to disclose the name of the person who tipped him off about a murder, he was jailed. The informant, it was later discovered, was a policeman! In Kansas, a writer was fined for refusing to tell who had given him a story about vice conditions in Topeka. In Kentucky, on two different occasions, newsmen were jailed for keeping the sources of stories relating to the legislature confidential. In Texas, a reporter was jailed for refusing to reveal who had given him a story involving Communists. The informant, in this case, it was later revealed, was an Assistant District Attorney! In the State of Washington, a newsman was put behind bars for not telling the source of a gambling expose. In New York City, an expose of the policy slip racket brought a reporter a jail sentence for refusing to supply the names of racketeers who had given him the story.[19]

The author's drive to give legal recognition to the newsman's code of ethics stemmed from an episode in 1945 involving an enterprising reporter who had disclosed appalling conditions in a Veteran's Administration hospital. This reporter was hauled up before a Congressional Committee headed by a Representative friendly to the V.A., and was requested to reveal the names of doctors who had given him his story. He refused to reveal his sources because the information had been given in confidence. Undoubtedly this recalcitrance reflected a fear that the doctors would be made victims of reprisals. The Committee cited the reporter for contempt, but later reversed itself.[20]

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19 See Law Revision Commission Report, Leg. Doc. (1949) No. 65 (A), for state by state listing of instances in which reporters have been penalized for refusing to disclose the source of their information.

20 New York Times, May 30, 1945, p. 17, col. 1.

If this could happen in Washington, DC, it could happen in New York State! The newsmen's privilege bill passed the Senate in 1946, but was not reported out of the Assembly Rules Committee.[21] In 1947 the bill was defeated in the Senate.[22] Then, as the 1948 session was drawing to a close, two newsmen in the city of Newburgh, reproduced policy slips on page one of the *Newburgh News* to indicate that gambling had not been exterminated in the community. When the District Attorney demanded to know the source of the slips, they refused to yield the information; when the grand jury requested the data, they refused again; and, when brought before the supreme court, they refused the judge's demand for the information, stating: "The code of ethics of the newspaper profession without statutory authority stipulates without compromise that violation of a confidence is the gravest ethical omission of which a newspaper man can stand accused."[23] The newsmen, Douglas V. Clarke and Charles Leonard, were jailed and fined.[24] Ministers, business and civic leaders thundered their denunciation of the imprisonment, and newspapers throughout the country clamored for the protection of a confidence law. The privilege bill suddenly became a "hot potato" in the legislature. Political leaders, caught in a presidential election year between the demands of newspapers and others for its enactment and the opposition of district attorneys and bar associations, decided to toss the "steaming spud" to the Law Revision Commission to cool off. The Commission was instructed by the legislature to study the matter and report back its recommendations in 1949.[25] This was an unprecedented action, but effectively took the leaders off the spot for a year. The Commission, consisting entirely of lawyers, employed a special research consultant to study the problem, held a public hearing, and considered the

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21 Senate Int. 939, Pr. 998 of 1946.

22 Senate Int. 1256, Pr. 1352 of 1947.

23 New York Times, Feb. 28, 1948, 1:2.

24 They were sentenced to 30 days in jail and payment of $100 each. Because of defective commitment papers, they served but 5 days.

25 See Joint Resolution by Rules Committee, introduced in the Senate, March 10, 1948.

matter at length. Early in the 1949 session, it reported that the privilege, with the two limitations mentioned earlier in this article, "may safely be granted."[26] However, the legislature was as loath in 1949 as it was in 1946 to grant the newsmen the privilege of protecting their source.[27]

With this historical background in mind, let us consider the merits or demerits of the proposal. There are but two basic questions that need answering: (1) Is the protection of the source of information vital to the free press? (2) Is the protection of the source of information vital in the public interest? An affirmative answer to these questions should indicate that newsmen are entitled to the privilege.

The drafting of any such privilege bill presents numerous problems. For instance, how can stock tip sheets and racing forms be excluded from the purview of the statute? Should all employees of a medium of mass communication be granted the privilege or only reporters? (Many tips come from circulation department employees.) How is a newspaper to be defined? (This is a rather tricky feat yet to be accomplished satisfactorily!) Should the privilege extend to all information given or solely to information given and printed? However, these difficulties are not insuperable once there is agreement on the broad principle that newsmen should be given the right to protect their informants.

Arguments Against the Bill

The opponents of the proposal contend that granting the privilege of protecting sources of information to newsmen will handicap the enforcement of law; that district attorneys, grand juries and legislative investigating committees will be thwarted in their search for criminals or information needed to protect the public.

Public officials argue that if newsmen do not have to reveal their sources, they will be enabled to write so-called "dope" stories, using the device of attributing information to "in

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26 See Law Revision Commission Report, Leg. Doc. (1949) No. 65 (A).

27 The Law Revision Commission's version was defeated in the Senate 18-26 on March 8, 1949.

formed quarters" or "insiders" when such sources may be merely fictitious and designed to lend authenticity to unwarranted attacks on public figures.

Bar associations argue that the privilege should not be extended, but indeed might well be severely restricted, and that the proposal, clashing with traditional legal principles, violates the canons laid down by Wigmore[28] who stated that four fundamental conditions must be present before a privilege should be granted:

(a) the communictions must originate in a *confidence* that they will not be disclosed;
(b) this element of confidentiality must be essential to the full and satisfactory maintenance of the relalation between the parties;
(c) the relation must be one which in the opinion of the community ought to be sedulously *fostered;* and
(d) the injury that would insure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.

There are other objections based on particular versions of the bill, such as the contention that it would permit the newsmen themselves, rather than a proper official, such as a judge, decide whether disclosure is in the public interest. Others argue that perhaps disclosure should be limited to matters not of public concern, such as private business matters, divorce cases, etc. Of course, there are a number of emotional, childish attacks, effectively used by legislators who are more concerned with defeating the proposal than with the logic of their argument, such as "Good newspapermen don't want the privilege; bad newspapermen shouldn't get it," an aphorism which is inaccurate in fact, and deceptive in logic. Upon objective appraisal, it does not appear that any of the arguments against the proposal really answer the two questions mentioned earlier as standards for judgment.

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28 Ibid, p. 531.

Arguments for the Proposal

It seems vital to our democracy that newsmen be free to expose waste and corruption in public office without fear of being hounded by citations for contempt, by threats of fines and jail sentences. Practically every case in which a reporter has been brought to court and requested to disclose his source has been one in which the newsman had performed a public service by revealing that the police were not enforcing gambling or vice laws. In many of these cases, there is a suspicion that the demand for the source was not prompted by zeal to track down criminals or corrupt officials, but by a desire to take vengeance on the "squealers."

The newsman is truly a guardian of the public interest. He is the conscience of our legislators, the public's independent auditor, the ferret of dereliction of public duty. Nearly two decades in public life have convinced the author that without the ever present news reporter of a free press our government affairs would be in a disreputable state. Democracy without a free press is no guarantee of freedom.

Anyone familiar with the history of our free press knows that newsmen have fought corrupt judges, bungling politicians, black marketeers, and the stealthy saboteurs of democracy, through the antiseptic power of exposure.

Furthermore, the operation of our free press, if we want it to be more than a mere compendium of official propaganda and releases, is dependent upon protecting informants. If they are not protected, the sources of stories will dry up. The fears of our district attorneys that such a law might interfere with their tracking down of criminals is groundless, for surely the law enforcement officials, aided by staffs of trained technicians and armed with the latest weapons of science are in a better position to find a criminal than is a reporter whose only equipment is a "nose for news."

Moreover, a survey of eleven states which have such laws indicates conclusively that police chiefs and attorney generals belive such statutes have in no way interfered with law enforcement.

As one judge said,[29] in refusing to cite for contempt a reporter who refused to divulge who had tipped him off to a story that state troopers were protecting bootleggers, "the press must get its information through others. Of necessity much is given in confidence and I am unable to hold the witness in contempt in this matter. It is true it is hard to have serious charges made against a public official on hearsay evidence but at times much good has been done in that way. It puts us all on guard to ask ourselves, 'Lord is it I?' "

The proposal merely gives legal recognition to a code of ethics that has been in effect for centuries. Deans of journalism schools and other leaders of the journalism profession have indicated that the refusal to reveal sources is a basic tenet of the newsman. In the absence of a privilege law, newsmen have traditionally preferred jail to being forced to reveal a confidence.

The argument that physicians, lawyers and clergymen are licensed or ordained and therefore subject to some control, seems irrelevant, as does the contention that physicians, lawyers and clergymen cannot publish information and therefore cannot do as much harm as a reporter, since the issue is whether such privilege is needed and in the public interest. The fact that the privilege may not be analogous to that of physicians, lawyers and clergymen is no argument against it.

Conclusion

It seems clear that the shield law is necessary for our free press to function satisfactorily, and that it would be in the public interest to grant such a privilege to newsmen. Those lawyers, district attorneys and bar associations who are hesitant about granting the privilege, fail to recognize that law is a malleable thing, that it must meet changing conditions or be changed. The fact is that in our complex society, government has become so vast, so intricate, so remote in its

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29 In re State of Tennessee v. Nat Caldwell, decided on May 28, 1948, in the Circuit and Criminal Court of Anderson County, 19th Judicial District, Judge Jessee L. Rogers, presiding.

internal administration, that our average citizen has neither the time nor experience to check on his public officials, and must usually rely on a free press for an audit of official activities. Therefore we must strengthen the hand of the free press so that it will not be hampered in its search for news—even at the expense of violating some of the cherished legal dogmas about privileged communications.

NEBBIA PLUS FIFTEEN

An Introduction

When a decision has been in the official reports for a period of fifteen years, it assumes an entirely different perspective from that which it presented to the attorneys who apprehensively or confidently, prepared it and noted it for argument before the court. It may now appear as one of many which follow an orthodox doctrine, although counsel had fondly hoped that he was blazing a new trail in the jungle of stare decisis. It may be hailed as a milestone in the law's pilgrimage toward the Mecca of perfect justice, although the victorious party may have been fighting to protect or assert a narrow, personal right in a spirit of complete selfishness, to say nothing of profound disgust at finding that most of the existing authority was arrayed against him.

Today, "People v. Nebbia" is a landmark in the law of public utilities. In 1933 it was, to Henry S. Manley, counsel to the New York State Department of Agriculture and Markets, a practical problem in advocacy, which involved justification of New York's Milk Control Law to a supposedly unsympathetic Supreme Court. His discussion of the background of that case and the maneuvering which preceded its inception and determination, serves as a valuable reminder that famous cases often presented, in prospect, many problems which retrospective consideration fails to perceive or appreciate. Mr. Manley's remarks concerning the Nebbia case are reproduced in the interest of heightening such appreciation and sharpening such perception.

NEBBIA PLUS FIFTEEN

By Henry S. Manley*

Fifteen years ago, when *Nebbia v. New York*[1] was awaiting decision by the Supreme Court of the United States, I had no idea that it would be a leading case in the law of public utilities. I had no such idea when it was decided by a five to four vote on March 5, 1934, or for several years thereafter.

True, I had picked out the public utility line of defense for New York's emergency milk control statute three months before it was passed—before it even was drafted.[2] True, the Nebbia case received considerable attention when the law was upheld by the Court of Appeals in July 1933, and nationwide attention in the winter of 1933-1934.[3] But the fate of New York's experiment seemed merely an incident in history compared with issues like the constitutionality of gold devaluation, the National Industrial Recovery Administration, and a dozen more revolutionary acts passed by Congress.

The significance of the Nebbia case can best be explained by an inquiry into its origins. The severe depression commencing in late 1929 brought added distress to dairy farmers of New York State, who had suffered from farm price declines shortly after the first World War and had not shared

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* Henry S. Manley, admitted to bar of New York State, 1919. Assistant Attorney General, 1925-1930, 1943 to date. Counsel to Department of Agriculture and Markets, 1931-1936. Writer of many briefs and a few law reviews and historical articles. Outline of remarks, February 1949, before Albany Law School class in Public Utilities.

1 291 U.S. 502, affirming People v. Nebbia, 262 N.Y. 259.

2 Constitutionality of Regulating Milk as a Public Utility, by Henry S. Manley, published in Cornell Law Quarterly Vol. 18, page 410 (April 1933, the same month L. 1933, c. 159 was enacted), and delivered as a speech in Albany, Jan. 19, 1933.

3 See N.Y. Times of June 14, 1933 (page 6 col. 2), July 12 (p. 19 col. 5), Oct. 24 (p. 26 col. 3), Nov. 3 (p. 14 col. 3), Dec. 5 (p. 2 col. 3), and Dec. 6 (p. 48 col. 4). The decision in March 1934 was front page news throughout the United States. The Index of Legal Periodicals lists 35 law review articles devoted to the Nebbia case between November 1933 and June 1934.

in the boom of 1927-1928. By 1932 prices paid to farmers for milk had fallen to unbearably low levels.[4] The Legislature created a joint legislative committee, headed by Senator Perley A. Pitcher of Watertown, to hold hearings and devise a remedy.[5] Over two thousand farmers packed the Capitol when the milk control bill was given a public hearing by the Legislature in March, 1933. In late March and early April there was a violent milk strike near Rochester lead by Albert Woodhead. Governor Herbert H. Lehman signed the milk control law on April 10, two days later he appointed Kenneth F. Fee as Director of Milk Control,[6] and two days after the Milk Control Board thus came into existence it issued its first price order. This order was the one destined to be involved in the Nebbia case, and fixed minimum prices to be charged by milk dealers and stores in their sales to consumers. The prices were those then prevailing, and the purpose of the order was merely to "put a floor under the market" and prevent price-cutting. Not until May did the Board take the further steps of fixing minimum prices that dealers must pay farmers, and raising the resale prices of milk throughout the State a penny a quart. The Board acted with the greatest possible energy, but the public did not understand the immensity of its problems and fed suspicion on the fact

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4 The following table which appeared in the State's brief before the Supreme Court of the United States indicates the decline of farm prices for milk before creation of the Milk Control Board in April 1933, how its orders reversed the usual seasonal decline, and caused a gradual improvement in subsequent months:

	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
1931....	2.25	2.22	1.97	1.75	1.58	1.49	1.66	1.81	1.92	1.95	1.90	1.62
1932....	1.61	1.58	1.48	1.30	1.16	1.07	1.10	1.22	1.30	1.34	1.40	1.29
1933....	1.17	1.12	1.01	.99	1.18	1.37	1.55	1.79	1.77	1.80	1.87	

5 The preliminary report of the Pitcher Committee was Legislative Document No. 59 of 1933, and its final book-size report was Legislative Document No. 114. Dr. Leland Spencer, a professor of agriculture economics at Cornell University, was technical adviser to the committee and was responsible for its excellent reports. Dr. Spencer has been called upon in various subsequent years to make additional reports on the costs and profits of milk distribution.

6 The Milk Control Board in 1933-1934 was composed of Charles H. Baldwin, Commissioner of Agriculture and Markets, who was chairman and possessed the hiring and disbursing powers of the Board, Dr. Thomas Parran, Health Commissioner, and the third appointed by the Governor.

that the Board's first order seemed for the benefit of dealers rather than farmers. After the Board had made its orders in May, but before their effect was reflected in farmers' prices or had become generally understood, there were violent milk strikes throughout the State, in which two lives were lost, several people badly injured, and much property destroyed. Governor Lehman called the Legislature into special session in August and some unimportant legislation was passed, but better milk prices for farmers were then becoming felt, and this was the main factor in ending the disorders. Meanwhile each public hearing of the Milk Control Board was a tumultuous, popular assemblage, and its every act was State-wide news.[7]

It was against that background of strife and suspicion that the constitutional issue was presented to the courts.[8] A choice had to be made between the alternatives of fighting or dodging. It was well understood that the Department of Justice was avoiding and delaying tests of all the federal New Deal legislation. The New York milk control law was to last only a year, and many well informed people felt that the Board's shrewdest strategy would be to delay every court test, and get as much effectiveness as possible out of the statute before it could be held invalid by a high court.

Meanwhile a search was on for a case that would present the constitutional issue speedily, and as favorably as possible. A big milk company disobeying the Board's order would have made the most sympathetic issue, but there was no chance of

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7 See generally, 1933 Public Papers of Gov. Lehman, pp. 146-149, 645-646, 649-671. It was notable that certain Communist leaders—some of them avowed and some merely suspect—were active on the milk issue while it was an occasion of public disorder. When the farmers were in distress these persons agitated for higher prices than the Board could reasonably set, but within a year the same people were heading disorderly groups of consumers complaining about the prices they had previously said were inadequate. Obviously the consistency in their tactics was to "fish in troubled waters" wherever they found them, and encourage the greatest possible suspicion of public officials and invested capital.

8 The author was at this time counsel to the Department of Agriculture and Markets and had taken on the added duties of counsel to the Milk Control Board. To him was entrusted the responsibility for shaping and presenting the case to the courts.

that. Those companies were under no temptation to that kind of lawlessness. In fact, they were at that time the most loyal supporters of the Board, to an embarrassing degree. The Board feared that the first test of the law might be made by a producer-dealer, such as a small farmer selling direct to consumers, who insisted upon competing for the market for his own product by selling at less than the minimum prices. Such a litigant would have had the advantage, impossible to weigh but perhaps sometimes decisive, of judicial and public sympathy. Under all the circumstances the most favorable test available to the Board seemed to be a storekeeper defying the minimum prices. An upstate storekeeper was indicated, because it would take longer to carry the issue through the New York City courts.

Just how Leo Nebbia, a small storekeeper in an Italian neighborhood of Rochester, was elected to the distinction, and provided himself with a first-class constitutional lawyer to present his issue, is not entirely clear. The diligence of the Rochester milk dealers association, and its attorney, Smith O'Brien, must have been an important factor. On April 19th two persons acting for the dealers' association bought from Nebbia's store two quarts of milk at the minimum price of nine cents per quart, and received as a "premium" a five-cent loaf of Italian bread. On May 4th Nebbia was arraigned in City Court for this lawless transaction, and was given an adjournment to obtain counsel. On May 14th he appeared with able counsel, Arthur E. Sutherland, Jr., now a professor of constitutional law at Cornell Law School. On May 22nd there was a short trial, limited to the constitutional issue, and Nebbia was found guilty and fined five dollars. The famous Nebbia case was on its way. When some larger storekeepers in Troy and elsewhere, after advertising their defiances of the minimum prices, meekly pleaded guilty and failed to fight, it was decided to accept Sutherland's challenge and make the Nebbia case the test. It was far from satisfactory,[9] but it was the best available.

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9 See People v. Gillson, 109 N.Y. 389 (1888), which held unconstitutional a statute designed to keep A and P from giving dishes as premiums with its groceries.

On June 8th County Judge Lynn affirmed Nebbia's conviction and on the same day the issue was certified direct to the Court of Appeals. Arrangements were immediately made to put the case on the calendar of the Court of Appeals five days later. Within that time the record and briefs were printed, and Mr. Sutherland and I argued the case on June 13th. The Cornell Law Quarterly article was made an appendix to my brief. The brief's main point was:

> "The distribution of milk is a business of such nature as to justify the application to it of some of the forms of regulation ordinarily applied to a public utility."

The Court of Appeals, somewhat to the surprise of persons following the case,[10] upheld the law. Judge O'Brien was the only dissenter.

From then on, amid the August milk strike and other excitements, nobody doubted the importance of the New York milk law and of the Nebbia case. Many other states passed similar laws. The Nebbia case was looked to as the test of New Deal legislation which the Department of Justice had thus far avoided.[11]

I did not look at it in that light. In the fall of 1933 I was invited to Washington for a conference participated in by Jerome Frank, Thurman Arnold, James Lawrence Fly and other New Deal lawyers. The problem was whether they should file briefs amicus in the Nebbia case, and I discouraged such a step, indicating that I planned to limit argument just as narrowly as possible to milk in New York in 1933. In my opinion this State law could be upheld on that narrow ground, but I expected the laws of the United States in which

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10 Former Solicitor General James M. Beck, who followed the Nebbia case closely, subsequently told me that he had expected, from some conversations he had with judges of the Court of Appeals at about this time, that the decision would be against the milk control law. There is reason to believe that the judges were dubious as to its validity prior to the argument.

11 When the Nebbia case reached the Supreme Court docket the N.Y. Times said (Oct. 24, 1933, page 26 col. 3) that this was "the first challenge of recovery legislation it has received, and the decision may determine the constitutionality of the administration's farm relief efforts."

my conferees were interested to be held unconstitutional. Our conference terminated in a chilly atmosphere. For the next few months the administration lawyers studiously ignored the Nebbia case. When it was decided, of course, they claimed a great victory for their concerns, but continued to evade tests as long as possible, until the slaughter of New Deal laws in 1935-1936. In my opinion their evasive course insured that result.

In November the Supreme Court assigned the Nebbia case for argument on December 4th. The Court's new building was under construction, but the Court continued to sit then and in the following year in its old courtroom in the Capitol. In an article in *Fortune* in November 1933, James M. Beck commented upon this circumstance as follows:

> "I rejoice that this great case, which may prove the greatest of our time or, indeed, of our history, will be argued in the present courtroom. It is the old Senate chamber of the United States, where Webster so nobly defended the integrity of the Constitution against the attack of Senator Hayne. For more than seventy years it has been the forum of that great Court. As the nine robed Justices sit before the Ionic pillars in that simple but very beautiful temple of justice, they will feel the links of the mighty past even more strongly than they would in the new grandiose temple to which they will soon remove and whose pompous splendor ill accords with the majestic simplicity of the world's greatest Court. In its present historic chamber, the nine robed Justices can calmly await the event, as did the Senators of Rome, when the populace had fled and the invaders were at the gates."

On December 5th and 6th, when Mr. Sutherland and I presented our case to the Supreme Court, the populace had not fled and not all the black-robed justices were calm. On the contrary, the newspaper accounts of the argument refer to the "crowded courtroom," and the fact that I was "frequently interrupted" by the four justices who subsequently

dissented. I remember their repeatedly pointing out the precedents against regulating the price of gasoline in Tennessee and of ice in Oklahoma[12] and their plaintive question: "If we uphold it for milk in New York don't we have to uphold it for wheat in Dakota and beef in the Southwest?" To which I answered, again and again: "I do not know about these other matters. I am here to tell you about milk, in New York State, in the year 1933."

What I told them about that, with the aid of the legislative report prepared by Doctor Spencer, can be found in the prevailing opinion of Mr. Justice Roberts. The United States News summed it up fairly well in its issue of December 11th:

> "Milk, the counsel contended, had many attributes of a public utility, and minimum price fixing was a common form of utility regulation."

The Supreme Court did not rest its opinion on the fact that the New York law was for one year only. Emboldened by this fact, the law was continued for successive years, until the power to fix prices to consumers was allowed to end in 1937. Meanwhile a plan was enacted by which milk farmers producing for certain markets are assured "equalized prices." Such a law enacted by Congress has been held constitutional, and so has a similar law of this State.[13] An order made by the Secretary of Agriculture under authority of the federal law regulates prices paid producers for milk to be consumed in the New York City area. Each time that the Secretary raises or lowers the price to the producers approximately a cent or a half-cent a quart there is a corresponding price change to

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12 Williams v. Standard Oil Co., 278 U.S. 235 (1929); New State Ice Co. v. Liebmann, 285 U.S. 262 (1932).

13 United States v. Rock Royal Co-operative, 307 U.S. 533; Noyes v. Erie & Wyoming Farmers Co-op., 281 N.Y. 187. Guernsey producers have been litigating for ten years whether they are entitled to a premium to compensate for the public preference for their milk, the benefits of which were taken from them by equalization, and whether if they get no premium their property has been taken unconstitutionally. Matter of Guernsey Breeders Co-op. v. Noyes, 284 N.Y. 197; Matter of Niagara Frontier etc. v. DuMond, 297 N.Y. 75; see also 284 N.Y. 563, 285 N.Y. 548, 749 mem., 291 N.Y. 704 mem., 294 N.Y. 692 mem., 297 N.Y. 517 mem., and numerous other citations.

New York City consumers. Consumer organizations and farmer organizations, each with allied politicians, strive against each other for the political pressure they can bring to bear upon the Secretary in support of their respective interests. Particularly in a year when a New York city mayor is to be elected, such as this one, there is a tremendous public clamor about milk prices. Similar, but less noticed from a State-wide viewpoint, are the milk orders as to the Buffalo and Rochester areas, administered under the State law by the Commissioner of Agriculture and Markets.

The milk industry in New York State still is, as it was fifteen years ago, in an anomolous position, midway between private enterprise and public utility. As Justice Roberts said, "the dairy industry is not, in the accepted sense of the phrase, a public utility." But as he also said, "Save the conduct of the railroads, no business has been so thoroughly regimented and regulated by the State of New York as the milk industry." Its status as a potential monopoly has been "frozen" by the law, so that nobody can enter the milk business, or build a new milk plant or start a new milk route or even extend one into a new neighborhood, without first convincing the Commissioner of Agriculture and Markets that such new business or expansion of an old one, "will not tend to a destructive competition in a market already adequately served, and that the issuance of the license is in the public interest."[14] It is questionable whether the public interest is well served by the half-way status of the milk industry in the past fifteen years, with the State exercising the power of restricting licenses merely to make the industry a quasimonopoly for those already in it. It is arguable that it should either quit this "stabilizing" activity, or should gradually reduce the number of licensees so that the public can have the benefit of possible

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14 Agriculture and Markets Law Section 258-c, first sentence. Illustrative cases under this provision are Begent v. Noyes, 284 N.Y. 229; Dusinberre v. Noyes, 284 N.Y. 304; Application of Dellwood Dairy Co., 288 N.Y. 715 mem.; Matter of Hood & Sons v. DuMond, 297 N.Y. 209 (now pending in Supreme Court U.S.). See also Agriculture and Markets Law, Section 258-j, third sentence, and Section 258-1, last paragraph, which even "freeze" the list of farms eligible to produce milk for each market.

operating economies from a more completely monopolized and regulated milk distributing industry.

Whatever may be done, the Nebbia case has settled that there is no clear dividing line, by use of a public franchise or monopoly in fact, which distinguishes the businesses which are "affected with a public interest," and hence subject to regulation of the sort put upon utilities.

COMPULSORY ARBITRATION OF LABOR DISPUTES IN PUBLIC UTILITIES†

By James J. Abernethy* and Angelo J. Ingrassia**

Within the past four years nine states[1] have passed laws requiring compulsory arbitration of labor disputes involving public utilities and other industries which render vital and necessary public service.[2] These laws reflect a developing legislative consciousness among the states that the general public must be assured, so far as possible, an uninterrupted flow of goods and services essential to their health and welfare. Precedent for special treatment of labor disputes in utility enterprises, with a view to avoiding interruption of essential service, has existed in one form or another in the federal field for many years.[3] And the Labor Management Relations Act,

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† This article was adjudged the best submitted in a course in Labor Relations at Albany Law School in January 1949 and has been adopted by its authors for publication.

* Class of June 1949.

** Class of January 1950.

1 Florida, Indiana, Massachusetts, Michigan, Missouri, Nebraska, New Jersey, Pennsylvania, and Wisconsin. Prompted by threat of a statewide telephone strike, New Jersey was the first of these states to take action.

2 Fla. Laws 1947, c. 23911; Ind. Laws 1947, c. 341; Mass. Laws 1947, c. 596; Mich. Laws 1939, Public Act 176, as amended Mich. Acts 1947, Public Act 318; Mo. Laws 1947, House Bill 180; Neb. Laws 1947, L.B. 537; N.J. Laws 1946, c. 38, as amended N.J. Laws 1947, c. 47 and c. 75; Pa. Acts 1947, Act 485; Wis. Laws 1947, c. 414.

3 Act of October 1, 1888, Acts 1887-88, c. 1063, 25 Stat. 501; Erdman Act, June 1, 1898, Public No. 115, 30 Stat. 424, 45 U.S.C. 101-125; Newlands Act, July 15, 1913, Public No. 6, 38 Stat. 103; Adamson Act, Sept. 3, 1916, Sept. 5, 1916, Public No. 252, 64th Cong., 39 Stat. 721, 45 U.S.C. 65-66; United States Railroad Adiministration, General Order No. 13, March 22, 1918, General Order No. 29, May 31, 1918, General Order No. 53, Nov. 13, 1918; Transportation Act of 1920, Feb. 28, 1920, Public No. 152, 66th Cong. 41 Stat. 456; Railway Labor Act, Act May 20, 1926, c. 347, Sec. 1, 44 Stat. 577; June 7, 1934, c. 426, 48 Stat. 926; June 21, 1934, c. 691 Sec. 1, 48 Stat. 1185; June 25, 1936, c. 1804, 49 Stat. 1921; Aug. 13, 1940, c. 664 Sec. 2 and 3, 54 Stat. 785, 786. Section 3 establishes the National Railroad Adjustment Board. Section 4, 5, and 6 deal with mediation of disputes. Section 7 provides that when a controversy arises between a carrier or carriers and their employees which is not settled by the processes of adjustment therein specified, such controversy may, by agreement of the parties, be submitted to arbitration; Sec. 10 provides that if an unadjusted dispute threatens to interrupt interstate commerce to such an extent as to deprive any part of the country of

1947,[4] illustrates in certain of its parts an application of a parallel technique to specified industrial labor deputies imperiling the national health or safety.[5] To date, however, the Congress has not seen fit to provide for compulsory arbitration of any labor dispute.[6]

It is the purpose of this article to present a brief comparative analysis of the state laws referred to above so far as they concern arbitration of labor disputes involving public utility and other enterprises subject to detailed governmental regu-

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essential transporation the President may, in his discretion, create an Emergency Board to investigate and report respecting the dispute. After the creation of such Board and for thirty days after it has made its report, no change, except by agreement, may be made by the parties to the controversy in the conditions out of which the dispute arose.

4 June 23, 1947, c. 120, 60 Stat. 141 - 144, 151 - 167, 171 - 182, 185 - 188, 191-197; as amended August 10, 1948, c. 833, 62 Stat. 1286, 29 U.S.C. 193.

5 Sec. 206 provides, "Whenever in the opinion of the President of the United States, a threatened or actual strike or lockout affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission or communication among the several states or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe." Under Sec. 208 the President may, upon receiving the board's report, direct the Attorney-General to petition any district court having jurisdiction of the parties to enjoin the strike or lockout. Under Sec. 209 the parties must make every effort to settle their dispute within sixty days from the date of any order issued by the district court. During this period the President shall reconvene the Board of Inquiry. The Board shall report at the end of the sixty day period the current position of the parties and any efforts made for settlement plus a statement by each party of its position and a statement of the employers' last offer of settlement. The report shall be made available to the public. Within the next succeeding fifteen days, the National Labor Relations Board shall take a secret ballot of the employees involved on the question of whether or not they wish to accept the last offer of settlement made by their respective employers. The results of this ballot shall be certified to the Attorney-General within five days thereafter. Sec. 210 requires the Attorney-General to move for a discharge of the injunction when he receives the certification of the results of the ballot or upon a settlement being reached, whichever first occurs. Senate Report No. 105, 80th Cong., pp 13-15; Conference Report, House Report 510, 80th Cong., pp 63-65. During World War II the War Labor Disputes Act (so called Smith-Connally Act), Laws June 25, 1943, c. 144, 57 Stat. 163, was enacted in an effort to curb strikes and lockouts in defense production. Beyond this, it is now claimed in some administration quarters that the President has inherent executive power to prevent

lation as to rates and sufficiency of service under the state police power.[7]

The General Problem and Its Background

Despite objections which may be raised by both labor and management, it seems that compulsory arbitration offers an effective and relatively rapid method for settlement of labor disputes, irrespective of the disputants or business enterprise involved. Where such a dispute involves an industry which provides goods or services essential to the public health or welfare, the relative efficiency of the device looms larger and the device itself assumes an aspect of affirmative desirability. When compared to available alternative techniques,[8] a serious question is presented whether the device may not be virtually the only adequate and practicable means for resolution of such difficulties.

It may be stated as a general proposition that a utility is not excused from its duty to serve the public merely because of a strike or other labor interference.[9] This would seem to

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national health and safety strikes, boycotts, lockouts, etc., without aid of congressional legislation. See Hearings Before the Committee on Labor and Public Welfare, United States Senate, on S. 249, 81st Cong. 1st Sess., at p. 232 passim, and pp. 268-296 (1949).

6 But see post, p. 42, and notes 14 and 15.

7 It is not possible, within the intended ambit of this paper, to consider the already troublesome problem of definition presented by the "national health or safety" clause in the Labor Management Relations Act, 1947. Nor is it possible to attempt any categorization of either those enterprises which would be subject to the type of regulation mentioned or the basis and criteria for their categorization.

8 See post, discussion at pp. 42-43.

9 Geismer v. L.S. and M.S.R. Co., 102 N.Y. 563, 7 N.E. 828 (1886). In this case the Defendant railroad was excused from performing but only on the grounds that the persons who prevented performance (strikers) were outside of the employ of the railroad at the time. Cf. Farmers Grain Co. et. al. v. Toledo, Peoria and Western R.R. et. al., 66 F. Supp. 845 (S.D. Ill. 1946); rev 158 F.2d 109 (C.C.A. 5th 1947); cert, gr. 330 U.S. 816, 67 S. Ct. 1081, 91 L.Ed. 1269. Lower court opinion stated that the railroad must serve even in the face of extreme violence, which had already resulted in the killing of several railroad employees, unless it could show that local or state police had not furnished or could not furnish adequate protection. See also Burlington Transportation Co. v. Hathaway 234 Iowa 135, 12 N.W. 2d 167 (1943).

be an inevitable derivative from the basic purpose of regulation to secure to the public necessary and adequate service at minimum reasonable rates. Utility proprietors cannot, merely because they believe that rates are inadequate, withhold service from the public until the latter agree to pay higher rates.[10] Should not these same limitations apply to utility employees? It is fundamental that a utility company is entitled to a rate which will produce a reasonable return upon its investment.[11] And it would seem to be a proper corollary that its employees should be entitled to a similar return upon their investment of time, training, industry, etc. But, determination of the corporate return —the shareholders' "wage"—far from being left to the sole discretion of the management (or even to the joint management-employee discretion),[12] is, generally speaking, controlled by the interested administrative commission subject to judicial review and some inarticulate constitutional limitations regarding confiscation. Thus, while it may be conceded—if concession were necessary—that employees should be entitled to a reasonable wage for working any given number of hours under particular conditions, it does not follow that, where the wages, hours, or working conditions are not acceptable to them, improvement may be coerced by means of a strike which may (or inevitably will) deprive the public of essential service. Should not such employees be obliged to seek their objective by means which will not im-

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10 Gainesville v. Gainesville Gas & Electric Power Co., 65 Fla. 404, 62 So. 919, 46 LRA (NS) 1119.

11 Smyth v. Ames, 169 U.S. 466, 18 S. Ct. 418, 42 L.Ed. 819, (1898); Minnesota Rate Cases, 230 U.S. 352, 33 S. Ct. 729, 57 L.Ed. 1511, (1913); Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 63 S. Ct. 1165, 88 L.Ed. 333, (1944). A consideration of the term "investment" is obviously beyond the scope of this article.

12 In the railroad labor field the technique of industry-wide bargaining on an almost total scale between the various carrier associations and the national employee brotherhoods has in practice, with each wage raise being followed by a proportionate fare of tariff increase and Interstate Commerce Commission approval, seemed to approach joint management-employee rate determination. In non-regulated industries (e.g. automotive manufacture), industry-wide bargaining has had a very similar effect on pricing of commodities involved.

peril or cause injury to the health or welfare of the general public? The answers to this and other questions raised or implied above turn upon consideration of power and policy.

Power

The "power" issue would seem to be virtually moot. In *Wilson v. New*,[14] the United States Supreme Court stated that Congress had the power to adopt an Act prescribing the eight-hour day as "basic" in the interstate railroad industry, whether such Act be regarded as a direct fixing of wages to meet the absence of a standard on the subject resulting from the dispute between the parties or as the exercise of the Congress' undoubted power to provide by appropriate legislation for compulsory arbitration, a power which inhered in its authority to protect interstate commerce.[15]

There have been many illustrations of the fact that employees in certain industries do not have an absolute right to interrupt service by strikes or other means. In *Stephens v. Ohio State Telephone Co.*[16] the United States District Court for the Northern District of Ohio held that the first duty of a private telephone company is to serve the public and that the public has an enforceable right to demand service. The court stated that it was empowered to say to the company that it must meet its public obligations, and declared that coupled with this power is the further power to lay its "prohibitive and punishing hand" upon anyone whose "wilfull and unlawful" conduct tends to render abortive the exercise of the first power. Disputes between employees and the

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14 243 U.S. 332, 37 S.Ct. 298, 61 L.Ed. 755.

15 Concurring in a separate opinion, Mr. Justice McKenna declared: "When one enters into interstate commerce one enters into a service in which the public has an interest and subjects one's self to its behests and this is no limitation of liberty, it is the consequence of liberty exercised, the obligation of his undertaking, and constrains no more than any contract constrains. The obligation of a contract is the law under which it is made and submission to regulation is the condition which attaches to one who enters into or accepts employment in a business in which the public has an interest." 243 U.S. 332, 364 (1917).

16 Stephens v. Ohio State Telephone Company, 240 Fed. 759 (D.C.N.D. Ohio, 1917) (Subscribers of a telephone company held entitled to an injunction restraining a strike which interfered with their telephone service).

utility, it observed, should be carried on, on both sides, without detriment to the company's public service. In reaching this conclusion the court emphasized that the public welfare is the first and supreme consideration.[17] Individual rights, it noted, are and plainly must be subordinated to the public good.

Policy

The "policy" issue remains. Attitudes with respect to it, however, have not been constant.

Kansas was the first state to adopt legislation requiring arbitration of labor disputes.[18] In 1920 its legislature declared certain enumerated businesses[19] to be "affected with the public interest." It also established a Court of Industrial Relations empowered, in case of controversy between workers and an employer which should endanger the continuity or efficiency of service in any such business, to bring the disputants before it and, after hearing and investigation, to fix wages and other terms and conditions of the employment relation. Striking in any of the enumerated industries was made unlawful, while calling or inciting a strike in such industries was declared to be a felony.

At the outset the law was bitterly opposed by both labor and management and sharp issue was early joined on the question of its validity. Finally, in *Wolff Packing Company v. Court of Industrial Relations,*[20] the Supreme Court held that, so far as the law permitted the fixing of wages in the Packing Company, it conflicted with the Fourteenth Amendment to the Federal Constitution and deprived the Packing Company of its property and liberty without due process of law.[21] As a result of this decision, the court became largely inoperative and finally was abolished.[22]

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17 Actually the court's expression was somewhat more classic. It aphorized: "Salus populi suprema lex," and "Salus republicae suprema lex."

18 Kansas Laws Spec. Sess. 1920, c. 29.

19 Those engaged in the manufacture and preparation of food for human consumption, production of fuel or clothing, transportation of any such commodities, and public utilities and carriers.

20 262 U.S. 522, 43 S.Ct. 630, 67 L.Ed. 1103 (1923).

21 The court did not declare compulsory arbitration void, but distinguished Wilson v. New, supra. See 262 U.S. 522, p. 542.

22 Kan. Laws 1925, c. 258, §3.

Following these events, and with the accelerating business expansion of the later twenties, the impulsions which had led to the Kansas experiment substantially disappeared. Nor were they directly revived by the economic cataclysms of 1929 and the early thirties. Legislative efforts to cope with the labor problems developing throughout the latter period and the years preceding World War II primarily concerned themselves with the immediate employment relation and uniformly rejected or avoided compulsory arbitration as a device for disputes adjustment. With the advent of war, however, the necessity of preventing interruptions in defense production stimulated a momentary recognition of the triangular pattern of these disputes.[23] When, in the first year following war's end, the surge of bitter controversies in the so-called "basic" industries brought the position of the bystanding consumer into sharp focus, the problem of preventing the serious public inconvenience and discomfort resulting from such controversies began to receive critical attention. In an address delivered before the American Bar Association on October 29, 1946, Mr. Donald R. Richberg observed:

> "It should be generally agreed that where voluntary agreements cannot be reached and unsettled labor disputes in public utilities threaten a serious stoppage of essential services, the parties should be required by law to submit their controversies to the binding decision of an impartial tribunal. There should be little objection from the managers and owners of utilities since their rates, services and accounting are regulated by law, and they are not at liberty to abandon their public obligations. There can be no sound objections from employees who are intelligent enough to understand that when they rely on a utility for their livelihood the public has a right to rely on them to make every reasonable effort to maintain continuous service. There is no

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23 War Labor Disputes (Smith-Connally) Act, Laws June 25, 1943, c. 144, 57 Stat. 163.

> involuntary servitude in denying men a right to strike. Each employee is at liberty to quit his job .... When the employer is practically the agent of the public, authorized by the government to render a public service, a concerted effort to compel him to yield to private demands is almost exactly on a par with a strike of government employees against the government."[24]

Similar views were expressed in other quarters:

> "Now on what grounds does the case for compulsory arbitration of labor disputes in basic industries rest? It rests squarely on the paramount conception of a free society, namely, that the essential human need of all people is our first concern. No responsible person will, for example, insist on the right of unionized firemen to strike. In their work the public need for their services is obvious. In these basic industries we have suggested, however, the connection between a work stoppage and the public hazards it would create are not so dramatically apparent, but I don't think that the fact of its existence can be argued away."[25]

The state statutes here to be considered reflect the policies inherent in these statements. In this respect they are substantially identical. But their likeness is not confined to motivation. All have underlying similarities. They will be discussed in the order of convenience.

Florida

The Florida Public Utility Arbitration Law[26] recites that it is the public policy of the State to facilitate the settlement

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24 "Labor Disputes in Public Utilities," Address to American Bar Association October 29, 1946, by Donald R. Richberg, member of the District of Columbia and Illinois Bars.

25 Merlyn S. Pitzelle, "Should We Require Compulsory Arbitration of Labor Disputes in Basic Industries?" "Reviewing Stand," Vol. 9 No. 9. Sept., 1947.

26 Fla. Laws 1947, c. 23911, F.S.A. sec. 453.

of public utility labor disputes[27] and that it is the duty of utility employers and their employees to exert every effort to settle such disputes. A "Definitions" clause enumerates the industries which are affected. This group includes those industries rendering electric power or light, heat, gas, water, communication or transportation services to the public.[28]

The statute provides for three steps to be taken in the settlement of labor disputes. In the event of any dispute the parties are required first to attempt settlement of their differences by collective bargaining. However, if the parties reach an impasse, either party may petition the Governor to appoint a conciliator.[29] If in the opinion of the Governor such an impasse has been reached and threatens to cause hardship to the public, the statute provides that the Governor shall appoint a conciliator. The conciliator is required to meet at once with the parties and endeavor to effect a settlement of the dispute. If he is unable to settle the controversy within thirty days, an additional period of fifteen days may be granted by the Governor. If the conciliator is unsuccessful, the Governor, if he thinks that the public will suffer hardship, shall appoint a Board of Arbitration[30] to consist of one public member to be chosen by the Governor and one member designated in writing by each of the parties to the dispute. In the event of failure by either party to so designate a member, such member shall be appointed by the Governor. A new Board is chosen for each separate dispute.

During conciliation, arbitration, or the effective period of an order of the Board of Arbitration all interruptions of work, slowdowns, strikes, lockouts, and work stoppages are prohibited.[31]

In conducting hearings the Board is given the power to administer oaths and to compel the attendance of witnesses. Upon hearing the evidence it makes written findings and

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27 F.S.A. Sec. 453.01.

28 F.S.A. Sec. 453.02.

29 F.S.A. Sec. 453.04.

30 F.S.A. Sec. 453.06.

31 F.S.A. Sec. 453.05.

must promulgate a written decision and order within sixty days from the date of its appointment. The Governor can at his discretion grant an additional thirty days. Unless reversed upon review the order of the Board is binding upon the parties and is effective for one year.[32]

The Board's order may be reviewed in the circuit court of any county in which the employer operates a business. Petition for review must be made within fifteen days after the order is filed with the clerk of the court,[33] and grounds therefor are limited to the orthodox ones.[34] The case is heard without a jury and the decision of the court is final unless an appeal is taken to the Supreme Court. Appeals may be taken by any interested party within the same period of time and following the same procedure as used in appeals from the Board.[35]

Strong penalties are provided for violations of the provisions of the Act, and violations are punished by fine or imprisonment or both. A remedy is created for anyone who is adversely affected by violation of the Act. An equity action may be brought in any circuit court to enjoin the violation and compel performance of the duties imposed by the Act.[36] To defeat the possibility of a charge of involuntary servitude, the Act specifically states that nothing in it shall be construed to require an employee to work without consent or to make illegal the quitting of his job unless done in concert or by agreement with others.[37]

Exempt from the Act's operation are utilities to which the Railway Labor Act applies and those owned and operated by municipalities, counties or other governmental units.[38]

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32 F.S.A. Sec. 453.07, 453.08.

33 F.S.A. Sec. 453.10.

34 Grounds for review are: (a) That the parties were not given a reasonable opportunity to be heard. (b) That the Board of Arbitration exceeded its powers. (c) That the order is unreasonable in that it is not supported by the evidence. (d) That the order was procured by fraud, collusion or other unlawful means or methods.

35 F.S.A. Sec. 453.11.

36 F.S.A. Sec. 453.13.

37 F.S.A. Sec. 453.15.

38 F.S.A. Sec. 453.16.

Indiana

The Indiana arbitration act[39] is similar to that of Florida. It has the same statement of public policy and it affects the same industries except that those rendering service in connection with heat are omitted and communications industries are limited to telephone.[40] This act, unlike that of Florida, however, makes provisions for maintaining a permanent panel of ten persons to act as conciliators and thirty persons to act as members of Boards of Arbitration. No person can serve as a member of both panels. Members are appointed by the Governor and can be removed by him at any time or any member may resign at any time by submission of notice in writing to the Governor.[41]

When the bargaining process reaches an impasse either party may petition the Governor for the appointment of a conciliator. The conciliator is allowed reasonable compensation for his services, to be fixed by the Governor and paid by the State.[42] Strikes, lockouts, and other service interruptions are prohibited until all procedures, provided for by the act, are exhausted.[43] Should the conciliator fail to effect a settlement within thirty days, the Governor can, if he thinks it is necessary, appoint a three-member Board of Arbitration from the panel of arbitrators. A new Board is chosen for each separate dispute and the arbitrators are allowed a reasonable compensation, to be fixed by the Governor, and the cost shared equally by the parties to the dispute.[44]

Each party to the dispute may appoint a representative to sit with the Board in an advisory capacity only. The powers and duties of the Board are similar to those of the Florida Board and a review of its findings and orders may be had in the same manner and on the same grounds. However, the Indiana Act makes no provision for appeal.[45] Injunctive relief

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39 Ind. Laws 1947, c. 341.
40 Id. Sec. 2.
41 Id. Sec. 4.
42 Id. Sec. 5.
43 Id. Sec. 6.
44 Id. Sec. 7.
45 Id. Sec. 9, 10, 11, 12 and 13.

is provided for anyone adversely affected by a violation of the act and no individual is compelled to work nor is anyone prohibited from quitting unless he is acting in concert with others.[46]

Pennsylvania

The Pennsylvania Act[47] affects those industries which are subject to the jurisdiction of the Pennsylvania Public Utility Commission and are engaged in the business of rendering electric, gas, water, and steam heat services to the public.[48] The Act provides that a twelve-person panel of arbitrators shall be maintained. This panel is to be selected by the Governor from a roster of recommendations submitted by a Labor-Management Advisory Committee which is appointed by the Governor and shall have equal representation from labor and management. Any member of the panel may be removed by the Governor at any time or any member may resign at will.[49] A new Board is selected from the panel to hear each separate dispute. The Board members shall receive a reasonable compensation, to be fixed by the Governor, the cost to be shared equally by the parties to the dispute.

In the event that a dispute arises and the parties are unable to settle it, either party or the Pennsylvania Labor Relations Board may petition the Governor to appoint a mediator. If, in his opinion, mediation is necessary the Governor may appoint a mediator from among those employed by the Department of Labor and Industry.[50] If the mediator is unable to effect a settlement within thirty days, he reports such fact to the Governor. Each party is then required to submit their best offer to the Governor who then requires the Pennsylvania Labor Relations Board to conduct an election among the employees on the question: "Shall the employer's offer be accepted?" If a majority of the employees accept the offer

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46 Id. Sec. 14 and 15.
47 Pa. Acts 1947, Act 485, 43 P.S. §213.
48 43 P.S. §213.2.
49 Id. §213.4.
50 Id. §213.5.

then the terms are accepted.[51] However, if the employees reject the offer the dispute is turned over to a three-member Board of Arbitration selected by the Governor from the panel of arbitrators.[52] Each party may designate a representative to sit with the Board in an advisory capacity.

The powers and duties of the Board are similar to those given to the Florida and Indiana Boards. The grounds for review are limited to the orthodox ones. The findings and order of the Board are reviewed, upon petition of either party, in the court of common pleas. The court shall hear the matter on the record as filed with the court, unless the petition for review alleges a ground on which no evidence was taken, in such case the court may require such additional evidence as it may deem necessary. Appeals may be taken to the Superior Court on matters of law, but such appeal must be taken within thirty days. The record certified shall contain all that was before the court of common pleas. If the jurisdiction of the Superior Court or a question of constitutionality is involved appeals may be taken to the Supreme Court within thirty days.[53] Injunctive relief is provided for anyone adversely affected by violations of the Act and no individual is forced to work nor is any person prevented from quitting unless done in concert with others.[54]

Wisconsin

The Wisconsin statute[55] covers industries furnishing water, light, heat, gas, electricity, public passenger transportation and communication services to the public.[56] It states that the Wisconsin Employment Relations Board (WERB) shall appoint and maintain a panel of persons to act as conciliators and arbitrators. Any appointee may be removed by the WERB at any time or may resign at will by giving notice in

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51 Id. §213.7.
52 Id. §213.8.
53 Id. §213.13.
54 Id. §213.15, §213.16.
55 Wis. Laws 1947, c. 414.
56 Id. §111.51.

writing to the WERB. Conciliators and arbitrators are paid a reasonable compensation to be determined by the WERB, for their services.[57]

When the parties to a dispute cannot settle it by collective bargaining they may petition the WERB to appoint a conciliator. If he cannot effect a settlement within fifteen days he reports such fact to the WERB and that Board then submits either three or five names, selected from the panel of arbitrators, to the parties. Each party shall strike one name from the list and the person or persons remaining shall be appointed the arbitrator or arbitrators.[58] The arbitration tribunal has thirty days in which to reach a decision and promulgate an order. The WERB may extend this time limit to sixty days. A certified copy of the order is filed with the clerk of the circuit court and is effective for one year from the date of filing.[59]

The powers and duties of the arbitration tribunal and the provisions for judicial review of an order of this tribunal are similar to those of the arbitration boards acting under the statutes previously discussed.

The constitutionality of the Wisconsin Act was upheld in *United Gas, Coke and Chemical Workers v. Wisconsin Employment Relations Board*,[60] where the Wisconsin Circuit Court for Milwaukee County found that all of the rights and constitutional guarantees involved in the statute are subject to regulation, under the police power, in the interest of the public welfare. It observed that the field of permissable regulation covers all acts of employers and employees which are affected by a public interest. The extent of allowable regulations is measured by the extent of the public interest. The utility and its employees are both subject to the law and the latter accept these facts as a condition of employment.

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57 Id. §111.53.

58 Id. §111.55.

59 Id. §111.59.

60 16 Labor Cas. 64, 905 (1948).

Michigan

Section thirteen of the Michigan State Labor Relations Act[61] was designed to provide for compulsory arbitration of labor disputes involving public utilities, municipally owned utilities and hospitals. The statute recites that in the event of a dispute which the mediation board is unable to settle,[62] such fact shall be certified to the Governor. The parties are then permitted, if they act within ten days, to submit the controversy to an arbitration board of their own choice. If they fail to do so, an arbitration board is then established consisting of a circuit judge, designated by the presiding circuit judge of the state, as chairman. Each of the parties then appoints a representative and they with the circuit judge as chairman constitute the arbitration board. If the parties do not make their appointments within five days, the Act provides that the Governor shall make such appointment. Each member of the board, except the circuit judge, is entitled to receive a compensation of twenty-five dollars per day to be paid out of the general fund. The powers and duties of the board are similar to those provided by the statutes previously discussed.[63]

In *Local 170 Transport Workers of America v. Gladola*,[64] the Michigan Supreme Court declared that Section thirteen of the Act was unconstitutional. This decision was based on the fact that the Act provided that a circuit judge should be a member of the arbitration tribunal, and the Michigan Constitution recites that no circuit judge shall be eligible for any office other than a judicial one for the duration of his term. Thus it was held that the Act conferred administrative powers upon a judicial officer and therefore was unconstitutional.

Although this decision in effect nullified the arbitration law, there are dicta in the opinion to indicate that the court

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61 Mich. Laws 1939, Public Act 176, as amended Mich. Acts 1947, Public Act 318.

62 Mich. Laws 1939, Public Act 176, §9a.

63 Mich. Acts 1947, Public Act 318, §13a.

64 15 Labor Cas. 64, 725, Mich. Sup. Ct. 1948.

did not think that compulsory arbitration in itself was unconstitutional. For example, it is stated by Bushnell, Ch. J.:

> "So compulsory arbitration of labor disputes in the field of public utilities and hospitals may, under the police power to safeguard the public interest, be within constitutional limitations, both Federal and State; and certainly so where the facts show a 'clear and present danger to the public interest.' "

In denying a petition for rehearing,[65] the Court stated that it had decided only that the method of selecting the arbitrators (circuit judges) was unconstitutional and that it had not said that compulsory arbitration as such was unconstitutional.

Nebraska

The Nebraska statute[66] establishes a Court of Industrial Relations which consists of three judges who are appointed by the Governor, with the advice and consent of the Legislature, for terms of six years. It is empowered to formulate its own rules of procedure, to subpoena witnesses and records, administer oaths, and to regulate the mode and manner of all its investigations, hearings and trials.

All labor disputes involving the service of a public utility[67] shall be settled by invoking the jurisdiction of the Court of Industrial Relations. Any employer, employee, or labor organization, or the State Attorney General on his own initiative or by order of the Governor, when any industrial disput exists between the parties, may file a petition invoking the jurisdiction of the court. After a petition has been filed, the court promptly convenes for preliminary proceedings

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65 15 Labor Cas. 64, 752.

66 Neb. Laws 1947, L.B. 537.

67 The term "public utility" as defined in the statute means any "person" which carries on an intrastate business and over which the government of the United States has not assumed exclusive regulation and control, and which furnishes transportation for hire, telephone service, telegraph service, electric light, heat and power service, gas for heating or illumination, whether natural or artificial, or water service.

and has the power to make such temporary findings and orders as may be necessary to protect the status of the parties, property and public interest involved, pending the final determination of the issues.

In its hearings and investigations, the court is limited to taking only such evidence and information of which a district court might take judicial notice, unless such evidence and information is made a part of the record in the hearing and opportunity is given, after reasonable notice to all parties, to rebut such evidence or information either by cross-examination or testimony. In its findings or order the court may establish or alter the scale of wages, hours of labor or conditions of employment. In so doing the court must take into consideration wages and working conditions in the same or comparable labor market areas.

Appeals from the orders of the court may be taken to the Supreme Court in the same manner and subject to the same time limitations as appeals from the district court. Appeals are heard and disposed of in the Supreme Court in the manner provided by law for the disposition of equity cases. Orders, temporary or final, entered by the court are of the same force and effect as orders entered by a district court and failure to obey any order or decree of the court shall constitute a contempt and be punishable as such.

Massachusetts, Missouri, New Jersey

The three remaining states, Massachusetts, Missouri, and New Jersey, have passed statutes[68] which provide for the seizure of the facility as well as arbitration.

Massachusetts

Under the Massachusetts act the Governor can summon the parties to a public utility labor dispute to appear before a moderator, appointed by him, and show cause why they

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68 Mass. Laws 1947, c. 596; Mo. Laws 1947, H.B. 180; N.J. Laws 1946, c. 38, as amended N.J. Laws 1947, c. 47, c. 75.

should not submit their dispute to arbitration or he may request the parties to voluntarily submit their dispute to an emergency board of arbitration. This board, appointed by the Governor, consists of three members one to represent industry, one to represent labor and one to represent the general public.[69]

If the parties refuse to submit to arbitration, the Governor can declare that an emergency exists and make an arrangement with the parties for the continued operation of the facility. If unable to make such arrangements, he may take possession of the plant or facility and operate it through any department or agency of the Commonwealth with the aid of any private instrumentality. Such plant or facility shall be operated on behalf of the person operating it prior to seizure. However, such person may waive all claim to the proceeds of such operation and receive a fair and reasonable compensation from the Commonwealth. The Governor can maintain this state of emergency until the dispute is settled or until he thinks that the danger of a service interruption has passed. The prevailing wage rates during the emergency period are those which prevailed previously or those recommended by any emergency board of arbitration which may be appointed during the dispute.[70]

Missouri

The Missouri statute provides for a permanent board of mediation to hear deadlocked disputes and make recommendations for their settlement. This board consists of five members appointed by the Governor by and with the advice and consent of the Senate. Two of the members shall be employers of labor or selected from some association representing employers of labor and two shall be employees holding membership in some bona fide trade or labor union. The fifth member shall be a person who is neither an employer nor an employee, and shall serve as chairman of the board of medi-

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69 Mass. Laws 1947, c. 596, §3.
70 Id. §4.

ation.[71] All members are appointed for terms of three years and the chairman receives a salary of five thousand dollars per year. The other members receive fifteen dollars per day while the board is hearing or deciding a dispute.[72] Should either party to the dispute refuse to abide by the recommendations of the board and it appears that as a result of such refusal an interruption of service threatens, the Governor may immediately take possession of the utility and operate it for the State. The Governor may retain possession until the dispute is settled.[73]

New Jersey

The New Jersey statute[74] declares it to be the policy of the State that heat, light, power, sanitation, transportation, communication, and water are life essentials of the people and that the State's regulation of the labor relations affecting public utilities is necessary in the public interest.[75] The Act makes it unlawful for any employee or any representative of a group or class of employees to engage in a strike or work stoppage until sixty days have elapsed after written notice of intention to institute, participate or aid in the conduct of a strike or work stoppage has been served, by the employee or representative, upon the State Board of Mediation. Likewise, any utility which intends to engage in a lockout must follow the same procedure.[76]

In the event that a dispute arises and as a result the effective operation of a public utility is threatened or interrupted the Governor is authorized to take immediate possession of the plant, equipment or facility for the use and operation by the State of New Jersey in the public interest. Such utility, plant, equipment or facility is to be returned to the owners as soon as practicable after the settlement of the dispute.[77]

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71 Mo. Laws 1947, H.B. 180, §3.

72 Id. §5.

73 Id. §19.

74 N.J. Laws 1946, c. 38, as amended N.J. Laws 1947, c. 47, c. 75.

75 Id. §1.

76 N.J. Laws 1947, c. 47, §2.

77 N.J. Laws 1946, c. 38, §13.

Within ten days after the seizure, the dispute is submitted to a Board of Arbitration to be constituted as follows: the management of the utility and the representative of the employees each designate in writing one person to serve as a member and file such designation with the State Board of Mediation. The two persons so designated choose three disinterested and impartial persons, and the five persons thus appointed act as the Board of Arbitration. If the two members first appointed fail, within the ten-day period, to select the remaining three members, the Governor shall appoint three impartial and disinterested members to serve on the Board. If either of the parties fails to appoint a member, the Governor then appoints all five members.[78]

The powers and duties of the Board of Arbitration are similar to those of the arbitration boards previously discussed.[79] Within thirty days after the Board has filed its findings, decision and order any aggrieved party may secure judicial review by appeal to the Supreme Court. In any such appeal the findings of the Board upon the facts, if supported by the evidence, shall be conclusive.[80]

The constitutionality of this statute has been tested. In *State of New Jersey v. Traffic Telephone Worker's Federation of New Jersey*[81] it was held that the statute is constitutional. The Court stated that the Act does not deprive the employees of their right to the equal protection of the law nor of their right to contract; that it imposes no involuntary servitude upon them and that the statute is a reasonable and apt measure for securing uninterrupted telephone service.

Conclusions

The effectiveness of any administrative system, whether executive, legislative or judicial, may reasonably be regarded as dependent upon two things: (1) the wisdom and validity of the charter, order or statute creating it, and (2) the character and qualifications of the persons responsible for its

78 N.J. Laws 1947, c. 47, as amended N.J. Laws 1947, c. 75, §4.
79 Id. §§5 & 6.
80 Id. §7.
81 15 Labor Cas. 64, 769, N.J. Ch. Ct. (1948).

administration.[82] Opponents of compulsory arbitration have not overlooked either objective in their attacks.

Objections directed toward the second factor have urged that the merits of the dispute will become secondary to its political considerations, that the arbitration process will be transported into the arena of practical politics where pressures will be applied to coerce appointment of aribiters sympathetic to a given viewpoint. To the extent that the appointive power may repose in a politically answerable group or individual,[83] and to the further extent that it may be exercisable in or only in an *ad hoc* fashion as disputes referable to arbitration arise,[84] it may be conceded *per argumentum* that this objection has some substance. But where the arbiters are appointed for specified terms or on a semi-permanent or permanent basis, the risk of "political" appointments would seem to be no greater than that involved in the appointment of judicial or other administrative officers.[85] Even where appointment is *ad hoc* and by a politically susceptible individual or group, it would not seem to be open to any greater objection fundamentally than the accepted practice of appointing referees and masters in judicial proceedings where determination of the facts may be decisive of the legal considerations involved.[86] Moreover, this problem essentially

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82 The factor of public cooperation, sometimes mentioned as the third determinant, seems properly includible as a criterion of wisdom.

83 Appointed by the governor in the following states: Florida, Indiana, Massschusetts, Missouri, Nebraska and Pennsylvania. Appointed by the Wisconsin Employment Relations Board in Wisconsin and by the parties to the dispute in New Jersey. The Michigan law provided for the designation of the chairman by the presiding circuit judge of the State.

84 Florida, Indiana, Massachusetts, Michigan, New Jersey, Pennsylvania and Wisconsin.

85 This is not to suggest an entire absence of the risk complained against. But acknowledgment of some risk does not require distortion of its degree. Even the matter of judicial selection is by no means uniform or universally agreed upon. Yet it is not asserted that because judges have at times been known to respond to political "impulses" the judicial system should be abolished.

86 It must, of course, be admitted that the type of issue ordinarily referred to a master or referee rarely if ever carries the explosive potential generally latent in the type of labor dispute which reaches the arbitration stage.

reduces itself to one of mechanics with respect to which precautionary safeguards could be provided to assure so far as possible in any case an impartial selection of arbiters.

So far as the first factor is concerned, there would seem to be no substantial legal objection to the validity of the device as such, although, as was discovered in Michigan's experiment, minor points of structural detail may well be vulnerable.[87] And so far as "wisdom" may be synonymous with "demonstrated need," there would seem to be abundant proof of public necessity for some device to avert the wasteful consequences and related hazards stemming from the type of labor dispute at which it is generally proposed to aim the compulsory arbitration process. On the further issue of "wisdom," judged from the standpoint of available alternative adjustment techniques—or even from the standpoint of the basic balance of costs between the economic effects of unrestricted labor-management "slugging," on the one hand, and the inevitable personal restrictions resulting from a "socialization" of such slugging, on the other—no such clear decision is presented.

It would not appear possible to resolve the issue as to relative costs—at least not in this forum. Argument on this point largely proceeds from bias or predetermination, and offers a merely speculative competition between "statistics"[88] supporting public necessity and constitutional concepts advanced to protect private property and personal rights.[89] But consideration of alternative techniques for disposition of these disputes is not so circumscribed.

While suggestions for handling public utility and similar labor disputes have been numerous, only a very limited num-

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87 Discursive analysis of the possible procedural defects in the statutes herein considered is not within the scope of this article.

88 Which seem to prove almost anything, dependent upon the sponsor's point of view.

89 Strange bedfellows in this field. Cf. Gregory, Labor and the Law, Chapters I and XIV, passim.

ber have been enacted into law.[90] Some which have received wide attention have never been tried,[91] and even certain of those enacted into law were never invoked.[92]

As already noted,[93] the Railway Labor Act has endeavored to deal with labor disputes in the interstate railroad industry which threaten to deprive any section of the country of essential transportation service, by authorizing the President to appoint Emergency Boards. The weakness in this law is that the Emergency Boards have only the power to make recommendations and these are not binding upon any party to the dispute. Without some sanctions to coerce a resolution of the dispute, these Boards are in final analysis helpless to protect the public against interruptions of service. This has been repeatedly demonstrated in the national railway strikes of recent years.

The so-called Smith-Connally Act[94] which provided for plant seizure was an extreme and repressive measure passed in a time of national emergency. It fell short of providing a satisfactory solution because it merely substituted the Government as the employer whenever labor trouble occurred in a vital industry.

The War Labor Board[95] was another creation of the late war. The net result of this measure was to make the Government a permanent party to the process of adjustment of disputes, thus reducing the disposition of the parties to arrive at a settlement without the Board's participation.

The so-called Taft-Hartley Law, a controversial statute if there ever was one, offers little in the way of real preven-

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90 No attempt is made here to catalogue all the various suggestions which from time to time have been voiced or even given legislative consideration. Only eight are discussed in any detail, and only four of these were ever law. With particular reference to the railroad industry, see ante. note 3.

91 Notably the proposal of Senator Homer Ferguson (R. Mich.). Senate No. 937, 80th Cong., First Sess.

92 Act of October 1, 1888: Acts of 1887-88. c. 1063.

93 See Ante, note 3.

94 Laws June 25, 1943, c. 144, 57 Stat. 163.

95 Executive Order No. 9017, Jan. 12, 1942.

tive.[96] It provides for injunctive process which is thoroughly resented by labor and leaves the parties as free as ever at the expiration of the injunctive period to resume their warfare. Also it has been frequently asserted that the parties are inclined to wait for the injunctive process to be invoked before beginning actual bargaining because of a feeling that in this manner a maximum tactical advantage can be gained. While this may, in one view, be salutary, in the broadest sense it would seem to be just the reverse.

The present administration's proposed Labor Bill,[97] which is designed as a substitute for the Taft-Hartley Law, offers less of a solution than does the law it is supposed to replace. It apparently contemplates Congressional action in the event of an uncontrollable emergency because it contains no real teeth.

Senator Irving M. Ives (R. New York)[98] is said to contemplate proposing a measure which will call for a cooling-off period and mediation and arbitration similar to that found in the provisions of the Railway Labor Act. This proposal would merely transfer to the industrial labor field the same defects now so apparent in the railroad labor field; hardly a public gain.

It was recently suggested to President Truman that a three-member "labor relations panel" be appointed to act as "a mediation agency of last resort" for the handling of labor disputes in atomic energy plants.[99] Since this panel is supposed to possess advisory power only, its weakness is obvious.

What would appear to be a most constructive proposal is found in the so-called Smith-Ferguson Bill.[100] This bill would establish a national labor court system with jurisdiction to hear and determine labor disputes brought before the courts by one or all of the disputants. As it stands, however, this bill does not provide an effective solution to our problem, as it

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96 See Ante, note 5.

97 S. 249, 81st Cong. 1st Sess. (1949).

98 Knickerbocker News, Albany, N.Y., March 7, 1949.

99 Knickerbocker News, Albany, N.Y., April 18, 1949.

100 See note 91 supra.

does not seek to prohibit strikes and, moreover, does not require resort to the courts where bargaining, mediation, and conciliation have failed.

The nine states which passed the compulsory arbitration statutes here discussed faced the problem of labor disputes in essential industries by taking aggressive action. In many states the problem remains completely unsolved.

Passage of compulsory arbitration statutes or the establishment of labor courts would seem to be the two alternatives which alone possess the ultimate capacity to resolve the issues in a dispute without transforming some branch of the government into an arbiter or employer. Of these two, compulsory arbitration has the advantage of bringing the issues to a conclusion because the parties are required to use the processes of the arbitration laws whereas under the proposed court system the parties could keep the dispute alive by staying out of court.

Management has much to say about its prerogatives being destroyed by compulsory arbitration laws. Labor claims that its rights are being violated. The answer to mangement's objection is that extensive regulation has long been the lot of those engaged in essential industries. And labor cannot complain if, after choosing employment in an industry essential to public welfare, it finds that the public imposes a condition of uninterrupted service upon such employment. In any view, however, arguments by labor that compulsory arbitration would impose involuntary servitude on the worker are patently specious. It is nowhere proposed that any limitation be placed on the worker's individual right to quit, as distinct from his right to strike.

Whatever the ultimate solution, whether it be a labor court system or federal or state compulsory arbitration laws, it is inescapable that something must be done. Public utilities are subject to regulation as to rates and sufficiency of service, all in the public interest. If that interest is truly paramount—and it can hardly be denied that it is—then it would seem to follow of absolute necessity that the utility employees should also be subject to some restraint. Their uncontrolled will should not be the measure of essential service to the public.

LEGISLATIVE CHANGES IN THE CODE OF CRIMINAL PROCEDURE

It has occasionally been suggested that the entire appellate practice in criminal cases is in need of re-examination (as is also the practice in criminal cases).[1] In the past few years (1941 to 1948) the legislature has made some necessary changes in criminal procedure without waiting for further consideration. Some of the more important alterations are outlined herein, without any attempt at discussion, in order to identify them and indicate their immediate effect upon the law.

APPEALS

Appeals by Defendant and People, and Appeals to Court of Appeals

In 1947 Sections 517, 518, 519 of the Code of Criminal Procedure were amended[2] so that appeals could be taken by the defendant or by the people in cases where there is an order "denying" or "granting" a motion to vacate a judgment of conviction and, in the case of appeal to the court of appeals, whenever such orders are affirmed or reversed. These sections were necessary to obviate defects apparent from previous cases[3] in relation to the procedure in hearing

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1 Judicial Council, 12th Annual Report, p. 52.

2 L. 1947, c. 706.

3 People v. Gersewitz, 294 N.Y. 163, 61 N.E. 2d 427 (1945) held there could be no appeal from order denying motion to vacate judgment. Matter of Hogan v. Court of General Sessions, 296 N.Y. 1, 68 N.E. 2d 849 (1946), held that to prevent court of general sessions from exceeding its jurisdiction, the court would grant a writ of prohibition. It stated "the writ is an extraordinary one which lies within the discretion of the court" and was particularly appropriate when "the error may not be corrected on appeal."

the motion to vacate a judgment of conviction in the nature of common law writ or error "*coram nobis.*"[4]

In this connection it should be noted that although the appeals from orders determining *coram nobis* applications are now authorized, an appeal from an order of affirmance by the appellate division of an order denying motion in the nature of *coram nobis* to vacate a judgment, must be dismissed where the appellant failed to comply with Section 520-3 C. Cr. Proc.[5] It was also stated in *People v. Goldstein*[6] that these amendments, none similar having been made in Sections 40 and 41 of New York City Criminal Courts Act, did not apply to appeals from the Magistrate's Court.

In 1942, there had been previous changes[7] in Section 518 whereby appeals were allowable from an "order of the court made at any stage of the action,[8] setting aside or dismissing the indictment on the ground other than the insufficiency of evidence adduced at the trial." These provisions were necessarily enacted to overcome the legal difficulty encountered in *People v. Reed*[9] wherein it was held that the people had no right to make the appeal. "Appeal to the appellate division and the court of appeals is entirely a matter of statute"[10] and the court could find no means of bringing the appeal within the statute. This change in Section 518-3 applies only to cases prosecuted by indictment, not to actions triable in Magistrate's Court.[11]

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4 "This writ (of error coram nobis) has been used to bring before the court a judgment previously rendered by it for the purpose of review or modification on accout of some error of fact and not of law affecting the validity of the proceedings and which was not brought in issue at the trial thereof." People v. Hoffner, 191 Misc. 419, 76 N.Y.S. 2d 916 (1947).

5 People v. Hatzes, 297 N.Y. 163, 77 N.E. 2d 385 (1948).

6 192 Misc. 337, 78 N.Y.S. 2d 256 (1948).

7 L. 1942, c. 382.

8 People v. Gehlberd, 272 A.D. 914, 70 N.Y.S. 2d 819 (1947) held that where defendant was granted a motion to dismiss on ground that the people failed to make out a prima facie case, and thereafter the court made the order, there was no longr any "stage of action" during which court could do so and thus the people could not appeal.

9 276 N.Y. 5, 11 N.E. 2d 330 (1937).

10 Id at 10, 11 N.E. 2d at 333.

11 People v. Goldstein, supra Note 6.

Method of Taking Appeal

In order to apprise the appellate courts of pending appeals and of certificates of reasonable doubts that are outstanding, the legislature made amendments in 1946 to Sections 522, 527 and 528.[12] It is now incumbent upon the clerk of the court in which notice of appeal is filed, to transmit to the court to which appeal is taken, the duplicate notice of appeal or certified copy of "reasonable doubt" in cases where judgments are stayed. Provisions for the time in which appeals should have been argued proved of little value without the vigilance of the prosecuting attorney, and "Unreasonable delay in the determination of criminal actions is subversive of public good and a disgrace to the administration of justice."[13] By such delay, criminals are often at large for lengthy intervals. These new steps are in accordance with procedure used in the Federal courts under the New Federal Rules of Criminal Procedure (1945).

Writs of Error and Certiorari

Section 515, abolishing writs of certiorari in proceedings and special proceedings, makes the only mode of review that of appeal. It seems that criminal contempt proceedings involving wilful disobedience during the course of a criminal trial had not been considered a special proceeding within the meaning of this section.[14] A new sentence added to this section makes it definite, now, that such contempt proceedings are not within its scope.[15]

Execution of Judgment of Death

The addition of Section 528-a[16] makes the granting of a motion for reargument by the court of appeals effective to stay the execution of judgment of death until the reargu-

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12 L. 1946, c. 942.

13 People v. Solomon, 296 N.Y. 85 (87), 70 N.E. 2d 404 (1946).

14 People v. Bach, 243 A.D. 787, 277 N.Y.S. 642 (1935); People ex rel. Nunns v. County Court, 188 A.D. 424, 176 N.Y.S. 858 (1919).

15 L. 1947, c. 900.

16 L. 1944, c. 251.

ment is determined, and if the conviction is affirmed, the court shall fix the week during which the sentence of death shall be executed.

Statement of Grounds for Reversal of Judgment

In 1943 the legislature amended Section 543-a[17] so that now the judgment or order of the appellate division reversing a judgment of conviction shall state whether the reversal was made upon the facts or upon the law or upon both the law and the facts. Formerly, when the appellate division reversed a judgment of conviction, the court of appeals assumed that the appellate division was satisfied as to the findings of fact if the order only specified that the reversal was for error of law. In accordance with the new procedure, the court of appeals sent back a case to the appellate division after reversing it on the law.[18]

Taking Appeals in Courts of Special Sessions

In order to resolve certain difficulties that had arisen in regard to appeals in courts of special sessions, it was necessary to make revisions in Sections 750, 751 and 753[19] so that Section 750 which formerly spoke of "allowing" an appeal now provides that they shall be taken as provided by Section 520. Section 751 was accordingly changed to provide for use of an affidavit of errors and outlining steps to be taken in perfecting an appeal. These legislative changes now differentiate the "method" of taking an appeal from the "right" as expressed in Section 520.[20]

The difficulties, apparent as a result of inconsistencies[21] in the application of Sections 520, 750, 751 and 752, ensued when Section 520 was amended in 1926 to allow appeal as a matter of right, subject to the provisions therein.

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17 L. 1943, c. 213.

18 People v. Kaye, 295 N.Y. 9, 64 N.E. 2d 268 (1945).

19 L. 1941, c. 251.

20 See generally, Judicial Council, 7th Annual Report, p. 52.

21 Compare People v. Pettet, 143 Misc. 704, 258 N.Y.S. 208 (1932) with People v. Wertheimer, 152 Misc. 733, 274 N.Y.S. 90 (1934), and People v. Griffin, 157 Misc. 757, 284 N.Y.S. 485 (1935). The latter admitted inconsistencies as to the sections involved but would not allow them to prejudice the defendant's rights when he had satisfied requirement of Section 520.

JURISDICTION

Local Jurisdiction in Desertion or Abandonment Cases

If a family now moves after the defendant has deserted or abandoned them, the jurisdiction of the courts shall be possessed concurrently, by the county where the desertion or abandonment occurred, the county of settlement or county of residence of such family according to Section 135-b.[22] When a person deserted or abandoned his family, the offense was generally considered to occur where the family was at the time the act took place and that county used to be the jurisdiction in which the wrong was punishable.[23]

TIME FOR COMMENCING AN ACTION

The legislature provided in 1946[24] that the statute of limitations in cases of larceny by a fiduciary must be prosecuted within five years, if a felony, or two years, if a misdemeanor, after the facts constituting the crime have been, or in reasonable diligence should have been discovered by the injured party, legal representative of an incompetent or an infant, or by the successor of the fiduciary. In case of the death of the injured party before the beginning of the period in which prosecution must be commenced, the action must be brought within five years (felony) or two years (misdemeanor) after his death.

The statute of limitations in all cases used to run from the date of the commission of the offense, but it was deemed quite essential for the benefit of the injured persons that the statute should be otherwise in cases involving trustees, guardians, agents or other fiduciaries where there was no method of discovering, nor any reason to suspect defalcation. The statute of limitations in such civil actions runs from the discovery of the facts constituting the fraud (C.P.A. Section 48) and this amendment was recommended to conform[25] with that statute.

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22 L. 1943, c. 593.

23 Matter of Henriksen, 182 Misc. 550, 44 N.Y.S. 2d 406 (1943) states that some offenses have been triable in counties other that the place where defendant resided and that courts have so held independently of Section 135-b.

24 L. 1946, c. 210.

25 Legislative Document No. 65 (D), 1946.

INDICTMENT

Arraignment

Section 296-a which was added in 1943[26] makes it necessary that the district attorney give at least one day's notice of the place of defendant's arraignment on an indictment, to the attorney appearing for the defendant. In *People v. Maduzio*,[27] the court denied application to set aside a conviction and ordered a re-arraignment when no notice of appearance had been filed by the attorney.

Grounds of Demurrer

A demurrer may now lie to any count thereof as provided for in Section 323[28] whereas it was formerly necessary to demur to the whole of an indictment. It has been suggested[29] that this requires an amendment to Section 518 as it allows appeal from judgment for defendant on a demurrer to the indictment and should also be changed to "indictment or any account thereof."

TRIAL

Exceptions

Section 420-a presently[30] provides that an exception shall be deemed to have been taken by the party adversely affected to every ruling either before or after the cause is submitted, when such party makes known to the court or judge his position by objection or otherwise. In cases of error in charging the jury (or refusing to charge them) there must be an express exception before the jury renders a verdict. In *People v. Bester*[31] the trial judge handed a chart to the jury from which they were to consider the crimes. This procedure was

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26 L. 1943, c. 277.

27 191 Misc. 396, 80 N.Y.S. 2d 439 (1948).

28 L. 1945, c. 629.

29 "Amendments Dealing with Administration of Criminal Law," Stanley H. Fuld, New York State Bar Association Bulletin, October 1945.

30 L. 1946, c. 209.

31 297 N.Y. 408, 79 N.E. 2d 732 (1948).

challenged by the defendant on appeal, but the court held that sufficient exception had not been taken.

Sections 445 and 446 of the Civil Practice Act were amended in 1938 and The Federal Rules of Criminal Procedure were similarly changed in 1944 so that an exception is deemed taken by a party adversely affected by the ruling if he makes known his position at the time of the ruling.

Reprieves, Pardons and Commutations

To alleviate further the condition of a wrongfully incarcerated person, the legislature provided in Section 697[32] that if he is pardoned due to innocence and based on evidence discovered after judgment of conviction and also after time for new trial has expired the judgment must be set aside and indictment, information or complaint dismissed and defendant shall be put in same position as though there had been failure to establish his guilt beyond a reasonable doubt.

A pardon normally has no retroactive effect but only relieves the offender of any penalties attached to a conviction. Sometimes injustices are done by convictions and when such is discovered, the aggrieved party is pardoned. When the pardon is granted on the basis of absolute innocence he may have a claim against the state.

The pardon in *People v. Larkman*[33] only stated defendant as being "represented unto us as a fit object of our mercy" and was held not to come within the above section, thus the conviction could be made the basis for sentencing defendant as third felony offender upon conviction for a new offense.

Ex Parte Order for Interception of Communications

Section 813-a of the Criminal Code allows[34] an ex parte order for interception of telegraphic or telephonic communications by an authorized party, from a justice of the supreme court or a judge of the county court or of a court of general sessions of the County of New York, when there is reasonable

32 L. 1946, c. 60.
33 187 Misc. 135 (1946).
34 L. 1942, c. 924.

ground to believe evidence of a crime may be thus obtained. The order is good for a limited time and a copy of it must be retained as authority for the act.

Section 605 of the Federal Communications Act prohibits interception and divulging of telephonic or telegraphic communications. In *Weiss v. U.S.*[35] the court held that information so obtained was improperly offered in evidence.

The court of appeals held that evidence so obtained pursuant to the above statute was proper under the police power of the state and that the Federal statute did not clearly supersede state's exercising such power.[36]

Proceedings Respecting Youthful Offenders

Initiated by laws added in 1942, provisions for the procedure in cases of youthful offenders now appear in Sections 913 (e-r).[37] Covered generally are youths (aged 16-19) who have committed a crime not punishable by death or life imprisonment and who have not previously been convicted of a felony. These may be adjudged youthful offenders upon recommendation of the district attorney and/or grand jury, or if the court of its own motion so decides. The court orders an investigation of the youth and if he is found eligible to be adjudged a youthful offender, no further action shall be taken on the indictment or information. Any testimony obtained during any of these proceedings cannot be used against the defendant, except in sentencing, and the proceedings are to be taken in a manner apart from regular trials. Section 913-n expresses the purpose of the section when it states that determinations made under this section shall not disqualify a youth from holding any public office and "no youth shall be denominated a criminal by reason of such determination."

COURTS OF SPECIAL SESSIONS AND INDICTMENTS

In 1944 Section 59-a was added so that a court of special sessions or a police court should be divested of jurisdiction

35 308 U.S. 321, 84 L. Ed. 298 (1939).

36 Matter of Harlem Check Cashing Corp v. Bell, 296 N.Y. 15, 68 N.E. 2d 854 (1946).

37 L. 1944, c. 632.

to proceed with hearing of misdemeanor if, before the commencement of the trial, the grand jury presents an indictment against the same person for the same offense.

To carry out the reform initiated by this section it was necessary to make further amendments in 1946.[38] Section 59 was extended to allow the district attorney to demand an adjournment so that he could present an indictment within the proper time. The effect of this statute has been to give the supreme court and county courts concurrent jurisdiction with courts of special sessions in misdemeanor cases.

In conjunction with the above changes, Section 270 was amended[39] so that in cases of a dismissal of a charge for either a *misdemeanor or a felony,* the charge can be again submitted to the grand jury or prosecuted in a court of special sessions, police court, or city court having jurisdiction to try it, only if a direction is obtained from the county judge of the county, or justice of the supreme court.

Formerly a prosecuting attorney was allowed to keep submitting the same charges to successive grand juries against the same prisoners, but then this power was curtailed by requiring a direction pursuant to Section 270. Since there may be an indictment now for misdemeanors under Section 59, it was necessary to add "whether it be felony or misdemeanor" to Section 270.[40]

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38 L. 1946, c. 149.

39 L. 1946, c. 149.

40 See Judicial Council 11th and 12th Annual Reports.

SIGNIFICANT CHANGES IN THE PENAL LAW

ABORTION (Article 2)

In 1942, section 81-a was added[1] to the Penal Law and, as amended,[2] now provides that a female who has violated or has attempted to violate section 81 of this article, by submitting to an abortion, can be compelled to give testimony, but this testimony shall not be received against her in a proescution after she has claimed her privilege against self incrimination.

BANKING (Article 26)

Section 304 was amended in 1945 so that the falsification of books, reports, or statements of insurers subject to the insurance law, falls within the felony provision of this section.[3] The act formerly applied only to those private bankers or corporations subject to the banking law.

BILLIARD & POCKET BILLIARD ROOMS (Article 31)

The 1947 legislature amended section 345 to allow persons who have received an executive pardon or a certificate of good conduct from the parole board after a felony conviction to apply for and be granted a license to conduct a billiard room as a public place of business for profit.[4] It is said to be an extension of the legislative policy of allowing persons released from prison more opportunities to carry on lawful business pursuits.

BRIBERY & CORRUPTION (Article 34)

Bribery of jurors, as used in this article, now includes both grand jurors as well as trial jurors, by amendment to section

1 L. 1942, c. 791.
2 L. 1944, c. 104.
3 L. 1945, c. 91.
4 L. 1947, c. 129.

370 in 1945.[5] Formerly, only talesmen were included within section 370. Noteworthy, also, is the recent amendment to section 382 which provides that the bribing of amateur as well as professional participants or prospective participants in games, sports, or contests, is now a felony.[6] This amendment was aimed at correcting the notorious examples of bribery in college sports.

BUSINESS & TRADE (Article 40)

In this article, the legislature in 1946 added section 421-d to the Penal Law aimed at preventing the uncontrolled use of governmental, military, or naval names in the selling of goods, wares, and merchandise not acquired from the United States Government or its agencies.[7] Restrictions were also placed on the use of these same governmental names as the corporate or trade names of stores.

Sections 435-a and 435-b were added in 1945 and the old section repealed so that these sections now provide that it is a misdemeanor for a person, with intent to defraud, to display or speak words that might reasonably be calculated to deceive a reasonable man into believing that certain articles of meat or food on sale are kosher.[8] Formerly, the sections required that the exact word "kosher" or certain marks or signs in simulation of that word, be used before one would be subject to the penalty.

Section 440 of this article, as amended in 1948, now permits the use of the family name of another in connection with a business enterprise so long as the full name or initials are not used.[9] This section also combines old section 440-b into section 440 as amended[10] and restated.[11]

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5 L. 1945, c. 734.

6 L. 1945, c. 602.

7 L. 1946, c. 430.

8 L. 1945, c. 844, Section 2.

9 L. 1948, c. 749, Section 1.

10 L. 1948, c. 749, Section 2.

11 See 1948 Legislative Document No. 65 (A).

CHILDREN (Article 44)

This article has had at least one interesting change in recent years. Section 495 has been added so that the Penal Law shall not be construed to deny the right of a parent or guardian or custodian to treat or provide for an ill, minor child in accordance with the religious tenets of any church, as authorized by the statute of this state, provided that the laws, rules, and regulations relating to communicable diseases and sanitary matters are not violated.[12] There have been no reported cases on this section.

Section 486, subdivision 3, has been amended so that a child of the age of fifteen who commits an act that would be punishable by life imprisonment or death can be brought within the jurisdiction of the Children's Court as a juvenile delinquent when the proper steps are taken.[13]

CIVIL RIGHTS (Article 46)

Upon the recommendation of the Law Revision Commission,[14] the legislature amended section 510[15] of the Penal Law to allow the institution of legal actions or proceedings by persons who were sentenced to a state prison for any term less than life, while released on parole or while sentence has been imposed, but the execution of judgment remains suspended.

The recent addition of section 518 to this article makes it a misdemeanor to discriminate against a person accompanied by a seeing eye dog by excluding that person from public places unless the admission of the dog would create a dangerous situation.[16]

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12 L. 1945, c. 462.

13 L. 1948, c. 554.

14 1946 Legislative Document No. 65 (F).

15 L. 1946, c. 260.

16 L. 1948, c. 299.

INDECENCY (Article 106)

Section 1141 prohibiting the sale, loan, showing or possession of obscene, lewd, and indecent literature was amended in 1941 to include the word "distributes" in the section so that all sources of the literature might be affected, it being believed that this would give more effectiveness to the act.[17] However, in the recent case of *Winters v. New York*,[18] the United States Supreme Court held that subsection 2 of section 1141, dealing with the printing, sale, or distribution of publications principally devoted to criminal news or stories of deeds of bloodshed, lust, or crime, was so indefinite and vague as to violate the Fourteenth Amendment. "A failure of a statute limiting freedom of expression to give fair notice of what acts will be punished and a statute's inclusion of prohibitions against expressions, protected by the principles of the First Amendment, violates the accused's rights under procedural due process and freedom of speech and press."[19] This same case had a long history in the courts of New York which upheld the validity of the provision passed upon by the United States Supreme Court. Subdivision 1 of Section 1141 which deals with obscene, lewd, and indecent prints and articles in general, was held constitutional by the Court of Appeals.[20]

LARCENY (Article 122)

The legislature, in 1942, repealed the old section 1290 and enacted a new section that redefined larceny.[21] Prior to 1942, this section set forth a definition of larceny which included the separate crimes of larceny, larceny by bailee or embezzlement, and obtaining property by false pretense. These separate crimes had to be prosecuted by separate indictment or by separate count in the same indictment. The legislature of

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17 L. 1941, c. 925.

18 333 U.S. 507 (1948).

19 Opinion of the court per Reed, J., at pp. 509-510 of 333 U.S.

20 297 N.Y. 687, 77 N.E. 2d 736 (1947) aff'ing 272 A.D. 799, 71 N.Y.S. 2d 736 (1947).

21 L. 1942, c. 732, Section 2.

the state, in passing the act, declared that it was the public policy of the state that the best interests of the people of the state will be served, and confusion and injustice avoided, by eliminating and abolishing the distinctions which had previously differentiated one sort of theft from another.[22] To accomplish this result, the present section 1290 says, after defining larceny as a single crime, "Hereafter it shall be immaterial in, and no defense to, a prosecution for larceny that:

"1. The accused obtained possession of, or title to, such property with the consent of the person from whom he obtained it, provided he induced such consent by a false or fraudulent representation, pretense, token, or writing; or

"2. The accused in the first instance obtained possession of, or title to, such property lawfully, provided he subsequently wrongfully withheld or appropriated such property to his own use or the use of any person not entitled to the use and benefit of such property; or

"3. The person from whom the accused obtained such property intended to part with title to, as well as possession of, such property, or with possession as well as title; or

"4. The purpose for which the owner was induced to part with possession of such property was immoral or unworthy."

At the same time, section 1290-a was added to regulate the pleading and proof required.[23] This statute requires the larceny indictment or information to allege false or fraudulent representation or pretense before evidence thereof may be received at the trial.

The recent cases of *People v. Karp*[24] and *People v. Lobel*[25] explain the effect of these sections. In the former case, the Court of Appeals said that the new larceny law was not designed to, nor did it in fact, broaden the scope of the crime of larceny or designate as criminal that which was previously innocent. In the latter case, the majority of the Court of Appeals was of the opinion that where an indictment failed to

22 L. 1942, c. 732, Section 1.
23 L. 1942, c. 732, Section 2.
24 298 N.Y. 213, 81 N.E. 2d 817 (1948).
25 298 N.Y. 243, 82 N.E. 2d 145 (1948).

charge false pretense in an indictment for theft, evidence of false pretenses was admitted where it appeared that the false pretense did not "effect" the larceny itself, but was merely part of the common scheme, but otherwise false pretenses must be alleged.

Section 1308, having to do with the buying, receiving, concealing, or withholding of stolen or wrongfully acquired property, was amended in 1943 to make the offense therein defined a misdemeanor instead of a felony if the property involved was valued at not more than one hundred dollars, except where purchased or held by a dealer, or purchased for resale, or where the defendant had been previously convicted of this crime.[26] This new act was questioned in *People v. Estreich*[27] as to the constitutionality of subdivision 1, paragraph b, which reads in part, "being a dealer in, or a collector of junk, metals, or second hand materials . . . buys or receives any . . . machinery equipment . . ." renders him guilty of a felony regardless of his knowledge or intent or diligent inquiry by the dealer. The court said this was, "an illegal and arbitrary interference with a lawful business, and, therefore, unconstitutional."[28] The court also said that the words "machinery equipment," as used in the statute, lacked the definiteness required of a penal statute.[29]

PRISONERS (Article 162)

The legislature in 1943 amended sections 1692, 1694 and 1696 of the Penal Law to provide that a person who rescues, escapes or aids in the escape of a person arrested or held in a civil action or proceeding is guilty of a misdemeanor.[30] Formerly, these sections of the law did not apply to any arrest or detention on a civil cause or proceeding.

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26 L. 1943, c. 180.

27 272 App. Div. 698, 75 N.Y.S. 2d 267 (1947).

28 272 App. Div. at p. 701.

29 272 App. Div. at p. 702.

30 L. 1943, c. 134, Sections 1, 2, 3.

PUBLIC HEALTH (Article 166)

A new section was added to this article dealing with the sale or possession of barbiturate drugs or preparations. Under section 1747-b, a physician's prescription must be presented before drugs of the barbiturate type may be purchased.[31] The law is aimed at the unrestricted and harmful use of preparations known as "sleeping tablets." The recent case of *People, on Complaint of Benedetta v. Wittpen*[32] dealt with the question of whether a prosecution could be had against the defendant who had attempted to use a false and forged prescription to procure barbiturates. The City Court of New Rochelle held that the defendant had not violated section 438, subdivision 5, of the Public Health Law by attempting to obtain a narcotic through the use of a false and forged prescription, since barbiturates are not classed as narcotics, and no prosecution would lie under the new Penal Law section, as the defendant did not consummate the transaction of obtaining the barbiturate. The court added that this case "indicates the need for immediate legislative amendment so as to carry over into the barbiturate statute provisions comparable to those now found in the narcotic statute."[33]

PUBLIC SAFETY (Article 172)

The legislature has undertaken to clarify and combine several sections of this article. Changes have been made in sections that deal with the licensing and possession of dangerous weapons, indicating closer supervision of these weapons. The new requirements, which deal with the steps required to be taken by applicants before issuance of permits, vary with the locality, so that the sections should be consulted with this in mind.

By amendment in 1944, the legislature changed section 1915 of this article so that it is now a misdemeanor for an attending physician to fail to report knife and similar

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31 L. 1946, c. 597, Section 3.
32 190 Misc. 565, 75 N.Y.S. 2d 670 (1948).
33 190 Misc. at p. 566.

wounds, actually or apparently such, which wound is likely to or which may cause death.[34] Formerly, this section applied only to gunshot and bullet wounds.

PUNISHMENT (Article 174)

Sections 1941 and 1945 have been amended after several years of study and recommendation.[35] These amendments concern the eligibility of various persons for parole. Section 1941, as amended, now provides that second and third felony offenders shall not be sentenced in excess of certain limits, depending on the offense, which limits are generally shorter than those in effect before the amendment.[36]

Section 1945 as amended, seeks to make eligibility for parole a matter of equality, irrespective of what the penalty was at the time sentence was imposed. Thus, second and third offenders serving life sentences for conviction of burglary or robbery in the first degree are now eligible for parole after thirteen years and four months. Also, some inequalities as to fourth offenders have been eliminated.[37]

REAL PROPERTY (Article 182)

Added to the law in 1946, section 2042 was aimed at discrimination in leases of buildings by making the person, firm, or corporation guilty of a misdemeanor where the lease contains a clause that the lessee shall remain childless or shall not bear children.[38] There have been no cases reported under this section.

SOCIETIES & ORDERS (Article 200)

A new section 2240-a that makes it a misdemeanor for a person, without authority under the laws of this state or of

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34 L. 1944, c. 674.

35 1947 Legislative Document No. 65 (D).

36 L. 1942, c. 700.

37 L. 1945, c. 726; L. 1947, c. 586, Sections 1-5; L. 1948, c. 230, Section 1.

38 L. 1946, c. 846.

the United States, to wear the uniform or a distinctive part thereof of the state or national military forces, but then this section exempts many common articles of wearing apparel from being classified as a uniform or a distinctive part thereof when distinctive buttons or insignia are removed.[39] The old section specifically referred to using the uniform, or a distinctive part thereof, in the solicitation of alms, to which the present law makes no reference.

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39 L. 1945, c. 490.

RECENT CHANGES IN SERVICE OF SUMMONS

In 1946, pursuant to recommendations of the Judicial Council, the legislature effected substantial changes in those sections of the Civil Practice Act dealing with service of summons by publication and personal service outside the state without an order.[1]

The first change consisted in a repeal of the former section 232 and the enactment of new sections 232, 232a, and 232b.[2] The primary purpose of this change was to achieve a more logical arrangement of the provisions regarding service of summons by publication. The former sections, extremely complicated in character,[3] is now divided into three sections; the first specifies the type of actions in which an order for service of summons by publication may be made,[4] the second sets forth the persons against whom the order may be made,[5] and the third lists the paper necessary for the making of such order.[6]

The amendment made *no* change in the prior law as to the type of actions in which service by publication may be made, but merely transferred paragraphs five and six of the former section to the present section.[7] Now, as then, an order permitting service by publication can be had only in matrimonial actions, actions *in rem*, and actions wherein the defendant's property within the State has been previously

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1 Twelfth Annual Report of the Judicial Council of the State of New York (1946) pg 58.

2 Laws of 1946, chap. 144.

3 ". . . a more illogically arranged and more redundantly expressed statute is hard to imagine." Rothschild, A Suggested Revision of the Statutory Treatment of Service by Publication. (1922) 6 NYU Law Rev 129, 139.

4 CPA Sec 232.

5 CPA Sec 232a.

6 CPA Sec 232b.

7 The Judicial Council considered expressly naming the causes of action for which an order for service by publication would lie, but in view of the well established constructions placed upon the existing provisions, no such recommendations were made. Eleventh Annual Report of the Judicial Council (1945) pg 195.

attached. The recommendation of the Judicial Council that an order for service of summons by publication should be permitted in an action *in personam* against an absent resident without a previous attachment was rejected.[8]

Section 232a which lists persons against whom an order for service by publication can be made is for the most part identical with the provisions of the former section 232. However, some changes were made in service on a domestic corporation, an unincorporated association and a resident of the State.

Such service on a domestic corporation is limited by the amendment to cases where the corporate name is unknown to the plaintiff after due diligence or where the plaintiff is unable to ascertain whether the corporation is a domestic corporation. The former law permitted service by publication on a domestic corporation when, with reasonable diligence the plaintiff was unable to serve certain designated officers of the corporation within the State. Such a rule seemed both unfair and unnecessary in view of the fact that the Secretary of State has, since 1934, been the involuntary agent for the service of process on every domestic coporation.[9] The result was a situation in which an order for service of summons by publication was statutorily permissable although the defendant domestic corporation could be served personally through the Secretary of State.[10]

A similar, though not identical, situation was presented in serving an unincorporated association by publication. Under the former statute, an order permitting such service could be had on a showing that neither the president nor the secretary of the association was a resident of this state, although in many instances the association, pursuant to law, had

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8 A bill to this effect was passed by the Legislature in 1945 but was vetoed by the Governor. See Eleventh Annual Report of the Judicial Council (1945) pp 197-203. Twelfth Annual Report of the Judicial Council (1946) pg 58.

9 Stock Corporation Law sec 25.

10 Carmody's New York Practice, vol. II sec. 686 note 58, cf Midvale Paper Board Co. Inc. v. Cup Craft Paper Corp. 173 Misc 786, 19 NYS (2d) 135 (1940) Order for substituted service under sec 230 refused because petition did not allege due diligence in attempting to serve Secretary of State.

appointed the Secretary of State as its agent for service of process. This violation of the fundamental principle that service by publication should be permitted only when personal service was impossible was corrected by the 1946 amendment, and it is now necessary to show by affidavit that "the plaintiff with due diligence has been or will be unable to make personal service of summons."[11]

By virtue of another change in section 232a service by publication may be made on any resident of this state who is *about* to depart the state with intent to defraud creditors. Previously an order permitting such service was available only upon a showing that the defendant *had* departed from the state. This change is in accord with a like amendment to section 903, dealing with attachments.

The 1946 Legislature also amended section 233, which deals with personal service without the state in lieu of publication, to provide that service should be made *"in the same manner as if service were made within the state."* Under the holding of *Howard Converters v. French Art Mills*,[12] a similar provision when applied to foreign corporations, was held to mean service as specified in *section 229*, providing for service on a foreign corporation within the state. Prior to this decision, section 233 had been construed by the Appellate Division as permitting service without the state on a foreign corporation only if made in conformity with service on a domestic corporation within the state as provided for in *section 228*.[13] The cases were distinguished on the ground that section 235 unlike section 233 contained a provision prescribing the manner of service which was to be made thereunder.[14] By virtue of the amendment the holding of *Howard Converters v. French Art Mills* is applicable to section 233, and service on a foreign corporation personally without the

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11 CPA Sec 232a par 6.

12 273 N.Y. 238, 7 N.E. 2d 115 (1937).

13 McCoy v. Erie Forge and Steel Co. 201 App. Div. 570, 194 N.Y. Supp. 696 aff'd 234 N.Y. 545, 138 N.E. 440 (1922).

14 Howard Converters v. French Art Mills, supra note 12 at pg 241.

state in lieu of publication must now be made in conformance *with section 229.*[15]

The most far reaching change effected in Article 73 in recent years was the revision of section 235, which in its amended form reads as follows:

> "*Personal Service Without State Without Order.*
>
> Where the defendant is a resident of the state, and the complaint demands judgment for a sum of money only, and in any case specified in section 232 of this act, the summons may be served without an order, upon a defendant without the state in the same manner as if such service were made within the state, except that a copy of the verified complaint must be annexed to and served with the summons, and that such service must be made by a person or officer authorized under section two hundred thirty-three of this act to make service without the state in lieu of publication. Proof of service without the state without an order shall be filed within sixty days after such service. Service without the state without an order is complete ten days after proof thereof is filed."

The statute, prior to the amendment, provided for personal service without the state in three types of actions: (1) Where the complaint demands judgment annulling a marriage, or for a divorce or a separation. (2) Where the complaint demands judgment that the defendant be excluded from a vested or contingent interest in or lien upon specific real or personal property within the state; or that such an interest or lien in favor of either party be enforced, regulated, defined, or limited; or otherwise affecting the title to such

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15 Sections 228 and 229 differ in that under section 229 the summons may be served on the cashier, director, or managing agent of the corporation only if the president, vice president, secretary, assistant secretary, treasurer, assistant treasurer cannot with due diligence be served; whereas under section 228 any of these officials or a clerk of the corporation may be served in the first instance.

property. (3) Where a levy upon property of the defendant within the state has been made under a warrant of attachment granted in an action to recover a sum of money only.

Specific reference to these actions was eliminated in the amended statute but they were incorporated into the section by reference to section 232 where they are specified in identical language with that employed in the former section 235. Prior to the 1946 amendment section 232 contained eight types of actions in which service by publication was permitted, while section 235 contained but three, in fact, however, section 235 comprehended all the actions specified in section 232. Aside from the provision of the amended statute permitting service of summons without the state in an action against a resident for a sum of money only, the only purpose of the amendment was to avoid confusion and redundancy and it neither increases nor decreases the scope of the former section.[16]

It will be noted that all three of the original types of actions in which service without the state was permitted were either *in rem* or *quasi in rem* and did not extend the courts' jurisdiction beyond the territorial boundaries of the state.[17] Both the property and the matrimonial actions are strictly *in rem,* the courts' jurisdiction being based on the property or marriage res located within the state.[18] The third type of action authorized by the statute, an action for a sum of money only, is a personal action, but attachment is made a condition precedent to service outside the state and without such prior attachment the service is void. The court's power over the absent defendant is dependent upon and co-extensive with its power over the attached property.[19]

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16 Ellsworth v. Ellsworth 189 Misc 776, 68 N.Y.S. 2d 394 (1947).

17 Matthews v. Matthews 240 N.Y. 28, 147 N.E. 237 (1923) Hanna v. Stedman 230 N.Y. 326, 130 N.E. 566 (1921) Odiens v. Odiens 265 App. Div. 641, 40 N.Y.S. 2d 179 (1943).

18 Matthews v Matthews supra note 17 (Court can adjudicate on the status of the marriage res without having personal jurisdiction of the parties). Schwinger v. Hickock 53 N.Y. 280. Garfien v. McInnis 248 N.Y. 261, 162 N.E. 78 (1928).

19 Dimmerling v. Andrews 236 N.Y. 43, 139 N.E. 774 (1923). Karchman v. Karchman 131 Misc. 462, 227 N.Y. Supp. 194 (1928).

Prior to 1940 it was doubtful whether the jurisdiction of a state court could be extended beyond the boundaries of the state.[20] Dicta in the leading case of *Pennoyer v. Neff* seemed to indicate that service without the state could not confer an *in personam* jurisdiction over a non resident.[21] (It was long established that such service would confer jurisdiction if there was a prior attachment of the defendant's property within the state). It was not until 1940 that this doubt was authoritively settled. In that year the Supreme Court of the United States, in the case of *Milliken v. Myers*, upheld a statute permitting personal service without the state on a *resident* of the state in an action for a sum of money. The Court based its decision on the rights of a state over persons domiciled therein saying:

> "Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service . . . The state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties . . . One such incident of domicile is amenability to suit within the state even during sojourns without the state where the state has provided and employed a reasonable method for apprising such absent defendant of the proceedings against him."[22]

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20 A State can exercise through its Courts jurisdiction over an individual domiciled within the state although he is not present within the State. Restatement Conflict of Laws (1934) sec 79. The Annotation to section 79 in the N. Y. Annotations (1935) reads: "The section is probably in accord with the law of New York." See Huntley v. Baker 33 Hun. 578 (1884). Rhodesian General Finance and Title Trust v. MacQuisten 170 Misc 996, 11 N.Y.S. 2d 476 (1939) (personal jurisdiction conferred by personal service without the country). Hunt v. Hunt 72 N.Y. 217, 28 Am Rep. 129 (1878). Section 114 of the Code of Civil Procedure of 1848 authorized service by publication in any action against a resident of the state. This was amended in 1920 to make attachment a condition precedent to such service.

21 95 U.S. 714 (1877).

22 311 U.S. 457, 462, 463, 464; 61 S. Ct. 339 (1940), rehearing denied 312 U.S. 712 (1941).

Taking advantage of this decision, the New York Legislature radically changed section 235 to permit a resident[23] of the state to be served personally outside the state in any action for a sum of money only without any prerequisite that property be attached within the state.[24]

The amended statute has in the few cases decided under it, received a liberal construction despite the rule that legislation in derogation of the common law is to be strictly construed. Although it is limited by its own terms to an action for a sum of money *only*, personal service under the section in an action against a resident to annul a marriage, *and* for alimony and costs, was upheld in *Ellsworth v. Ellsworth*[25] and in subsequent Supreme Court decisions[26] despite the fact that such actions are for a sum of money and an annulment. In reaching its decision the Court never questioned the limitation placed on the new provision by use of the phrase "an action for a sum of money only."[27]

There have been no decisions as to whether personal service without the state in an action to foreclose a mortgage on property located within the state and for a deficiency judgment would give the Court the necessary personal jurisdic-

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23 The term resident as used in this statute means domicilliary. Any other construction of the term would violate the rule of Pennoyer v. Neff supra note 21.

24 This addition relieves substantial inequities previously existing in suits between residents of the state. A defendant, under the prior law, could seriously inconvenience a claimant by absenting himself from the state. If he left no property within the state the claimant would be obliged to follow the defendant and institute his action in another state by personal service therein. Even if the absconding defendant left property in New York the plaintiff would be powerless for at least six months unless he could prove a fraudulent intent on the part of the defendant. After proof of the defendant's absence for six months or his intent to defraud creditors, the plaintiff could proceed by attaching property within the state, but would be required to post an undertaking to the effect that if the warrant of attachment was vacated he would pay damages sustained by the defendant by reason of the attachment. By virtue of the change a plaintiff can no longer be so inconvenienced.

25 Supra, note 16.

26 Feldman v. Feldman 189 Misc. 564, 72 N.Y.S. 2d, 390 (1947).

27 The Ellsworth decision overcomes the decision of May v. May 233 App. Div. 518, 253 N.Y. Supp. 566 (1931) which held that personal service made without the state did not confer the personal jurisdiction necessary to award alimony or costs.

tion. The Court would have an "in rem" jurisdiction of the foreclosure cause of action under the specific property provision of the statute,[28] and presumably the deficiency judgment by virtue of the reasoning in the Ellsworth case would fall within the provision permitting such service in an action against a resident for a sum of money only.

By virtue of the amendment it is now necessary to serve a *verified* copy of the complaint with the summons. This change conforms section 235 with section 232 which has long required the filing of a verified complaint as a condition for obtaining an order for service of summons by publication. This change was especially necessary in section 235 because of the lack of judicial supervision in effecting service thereunder.

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28 Schwinger v. Hickock supra note 18. Personal service without the state confers jurisdiction to adjudicate rights in property located within the state but is not sufficient to uphold a judgment for a sum of money. Cf Hielbrunn v. Kellogg 279 N.Y. 773, 18 N.E. 2d 312 (1938).

RECENT CHANGES IN FEDERAL REMOVAL PROCEDURE

The recent revision of the United States Code, title 28,[1] has completely altered the procedure for removing cases from state to federal courts. The new provisions are to be found in 28 USC §1446-1450.[2]

Under 28 USC §1446, the uniform procedure generally applicable to all removals is as follows:

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) The petition for removal of a civil action or proceeding may be filed within twenty days after commencement of the action or service of process, whichever is later.

(c) The petition for removal of a criminal prosecution may be filed at any time before trial.

(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

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1 Act June 25, 1948, C. 646, eff. Sept. 1, 1948.

2 Based on title 28, U.S.C., 1940 ed. 72, 74, 75, 76.

(e) Upon the filing of such petition and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further therein unless the case is remanded.

(f) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshall shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.

Under the new procedure, removal of a civil case will ordinarily take the following course:

(1) Defendant files his petition and bond in the proper *district court,* within twenty days after commencement of the action or service of process, whichever is later.[3]

(2) Upon filing, defendant gives written notice thereof to all adverse parties and also files a copy of his petition with the clerk of the State court, "which shall effect the removal."

(3) Defendant may move for an order granting his petition for removal.

(4) Plaintiff may move for an order remanding the case to the State court.

(5) Defendant files motions or answers in federal district court.[4]

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3 The requirement for a cost bond is limited to civil actions, as is the twenty day limitation for filing the petition. No bond is required in criminal prosecutions, and these may be removed at any time prior to trial.

4 Procedure in removal cases is now governed by the federal Rules of Civil Procedure [Rule 81 (c)] and the Federal Rules of Criminal Procedure [Rule 54 (b)]. Accordingly, many details appearing in the former removal sections have been omitted as unnecessary.

The provisions for filing the petition in the district court rather than in State court as previously, should do much to eliminate the awkward situations arising when the State and federal courts made conflicting determinations as to removability. Responsibility for passing upon the question is placed with the federal courts, with no order or action by the State court required as a preliminary requisite. This seems to be the desired effect of sec. 1446(e) although its language is ambiguous, and is open to the construction that the State court shall take some affirmative action to effect removal. The State court is forbidden to proceed further with the case, and 28 USC §2283 gives the district court power to enjoin any attempt by the State court to retain jurisdiction.

It should be noticed that the new procedure provides a uniform time for filing the petitions, "within twenty days after the commencement of the action or service of process, whichever is later," in place of the former law which made such time depend upon the State procedural statutes. The time for pleading after removals is now covered by Rule 81(c) of the Federal Rules of Civil Procedure,[5] rather than the provisions of former Sec. 72 of Title 28 USC.

The new statute clearly specifies the venue on removal. It is the "district and division within which such action is pending," regardless of whether, as a matter of original jurisdiction, the action could have been brought there.

There is no explicit outline of the procedure to be followed after the filing of the petition in the district court.[6] Defendant will probably request and receive an order removing the case. However, the court may, of its own volition, remand the case if jurisdiction is absent.[7] The question of jurisdiction

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5 "In a removal action in which the defendant has not answered, he shall answer or present the other defenses or objections available to him under these rules within the time allowed for answer by the law of the state or within five days after the filing of the transcript of the record in the district court of the U.S., whichever period is longer, but in any event within twenty days after the filing of the transcript."

6 Except as it may appear in the Federal Rules of Civil Procedure. [Rule 81 (c)].

7 28 USC §1447 (e). See Wabash R. Co. v. Lindley (CCA8) 29 Fed 2nd 829.

may also be raised by plaintiff's motion to remand. In the event that an order to remand is granted, the State court is notified and thereupon proceeds with the case. It would appear that the defendant may appeal from such order to the Court of Appeals, since it is a final decision of the district court.[8] Past rulings to the contrary were compelled by the language of former Sec. 71 of Title 28 USC, which forbade appeals from district court decisions remanding cases.[9] The present statute contains no such provision, leaving the situation to be governed by 28 USC §1291.[10]

In the event that the court orders removal, its action will not be appealable under 28 USC §1291.[11] However, this question may be raised before the Court of Appeals on appeal from the final judgment.[12] The removal might conceivably be tested at an earlier stage of the action in the event that the plaintiff attempted to proceed with his action in the State court. Defendant could then apply for an injunction under 28 USC §1441 (d). In such a proceeding, the propriety of the removal would be in issue and appeal might be taken from the order granting or denying the injunction.[13]

While the new removal statute does not eliminate all possible difficulties and conflicts, it does appear to represent a great measure of improvement over the prior procedure.

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8 28 USC §1291. Odell v. H. Batterman 223 Fed 292, 133 CCA 534; Morgan v. Thompson (CCA8) 124 Fed 203; cf language in German Nat. Bank v. Speckert 181 US 405, 21 Sup. Ct. 608, 45 L. Ed. 926; see also Gay v. Ruff 292 US 25, 54 Sup. Ct. 608, 78 L. Ed. 1099.

9 Kloeb v. Armour & Co. 311 US 199, 61 Sup. Ct. 213, 85 L. Ed. 124.

10 It is not within the scope of this note to examine the soundness of this proposition. As to the possibility that relief might be had by mandamus, see Ex Parte Pennsylvania Co. 137 US 451, 11 Sup. Ct. 141, 34 L. Ed. 738.

11 Inasmuch as it is not a final decision within 28 USC §1291. See cases cited in note 8, supra.

12 Under 28 USC §1291.

13 Johnson v. Butler Bros. 102 Fed 2nd 87.

Comments

JURISDICTION OF COURTS OVER MINOR CHILDREN IN MATRIMONIAL ACTIONS

Plaintiff, husband, and defendant, wife, were married in New York State and maintained a domicile there. Subsequently they had one child. Plaintiff and his family visited the home of the wife's parents in Connecticut, and upon conclusion of the visit the wife, with the purported intent to remain in Connecticut to procure a divorce, refused to return to their New York home with the plaintiff. Leaving his wife and child in Connecticut, the plaintiff returned to New York where, before his wife had satisfied the residential requirements for a Connecticut divorce, he commenced an action under Section 1161 of the C.P.A. for a separation upon the grounds of abandonment and asked for custody of the child. Defendant was personally served in Connecticut and made no appearance. Judgment of separation was granted and custody of the minor child was apportioned between the parties. The trial court had found that no change of circumstances had occurred since the separation decree was rendered. The plaintiff arrived in Connecticut armed with the New York decree and brought a habeas corpus proceeding in Superior Court to secure possession of the child. The court awarded custody of the child to the wife giving plaintiff a right of visitation. Upon appeal by the plaintiff the judgment was affirmed. *Boardman v. Boardman,* 135 Conn. 124 62 A. 2d 521 (1948).

The Court in its opinion noted: First, that a wife may, regardless of fault, acquire a domicile separate from that of her husband, for the purpose of bringing an action for divorce. Secondly, it was pointed out that New York and Connecticut both have joint guardianship statutes, and in such event the domicile of the child is the same as that of the parent with whom he lives. Finally, the Court concluded

that since the domicile of the wife was in Connecticut the domicile of the child was that of the mother, and that, therefore, so much of the New York decree as awards custody of the child is beyond the jurisdiction of the New York court and full faith and credit need not be given.

In deciding that a wife may have her own domicile, the Court said:

> "We regard it now as settled that within the scope of the full faith and credit clause of the United States Constitution, Article 4, Sec. 1, a woman may of her own choice, regardless of fault, acquire a domicile separate from that of her husband, at least as far as concerns a divorce action."

As authority for this conclusion, the Court cited *Williams v. North Carolina*, 317 U.S. 287, overruling *Haddock v. Haddock,* 201 U.S. 562. The validity of this assertion is now beyond question. But it may be noted that the defendant in the present case had not commenced an action for divorce in Connecticut and the Connecticut trial court expressly found that the defendant was not justified in living apart from the plaintiff. The court apparently based its holding that the wife had acquired a separate domicile upon the mere suggestion that she intended to bring a divorce action. The effect and desirability of such a rule is beyond the scope of this discussion. However, it appears to be a departure from the established rule that a wife may maintain a separate domicile only for justifiable reasons, by agreement with her husband, or for the purpose of a divorce action (*Kinnier v. Kinnier,* 45 N.Y. 535, 6AR 132; *Torlonia v. Torlonia,* 108 Conn. 292; *Clapp v. Clapp,* 272 App. Div. 378, 71 N.Y.S. 2d 354; *Dean v. Dean,* 241 N.Y. 240, 149 NE 844; *Williamson v. Osenton,* 232 U.S. 619).

Assuming that the conclusion as to domicile of the wife is correct, the court follows the apparent weight of authority in holding that, as a result of the joint guardianship laws of both New York (Sec. 81 D.R.L.) and Connecticut (General Statutes Sec. 4793), the domicile of the child is the same as

the domicile of the parent with whom it is living. It should be noted however, that the law on this point appears to be in a state of some confusion where the wife has, without cause, left her husband and taken their children with her.

In *Ex Parte Halvey,* 185 Misc. 52 55 N.Y.S. 2d 761, Aff'd 269 App. Div. 1019, aff'd 295 N.Y. 836, aff'd on different grounds 330 U.S. 610 67 Sup. Ct., 903 (1945) the plaintiff wife left her husband and without his knowledge and consent took their son with her to Florida and there filed suit for divorce. The divorce was granted and custody of the child awarded to the wife. Thereafter, the husband without the knowledge and consent of the wife, brought the infant back to New York State. In a habeas corpus action instituted in New York by the wife to regain custody of the child, the question was presented, although not necessary to the decision, whether the Florida court had jurisdiction of the infant son so that the custody provisions of the decree would be entitled to full faith and credit. It was held that the child was domiciled in Florida. In so holding the Court said:

> "It has been asserted that, where a married woman is the joint guardian of her children with her husband, as in New York, D.R.L. Sec. 81, the domicile of the children is that of the mother wherever she establishes a domicile apart from her husband and the children actually live with her. No case of authority on that point has been called to my attention and none has been found. In view of the growing liberality with respect to the acquisition of a separate domicile by married women and the equally growing liberality in permitting the mother to control the domicile of her children, it will be assumed that the custody provisions of the decree are entitled to full faith and credit."

However, it should be noted that the Appellate Division and the Court of Appeals affirmed the decision without opinion, and the United States Supreme Court in affirming this decision on other grounds expressly refused to render an

opinion as to whether Florida had jurisdiction of the child (330 U.S. 610, 615, 67 S.Ct. 903 at page 906).

However, in *People v. Brooks* 35 Barb 85, (1861), decided after the enactment of the N. Y. Joint Guardian Statute, it was asserted that a wife living in a state of voluntary separation from her husband, has no right to the custody of their children and "that it is only in connection with her husband that she takes any rights of guardianship."

In *Matter of Throne,* 240 N.Y. 444 148 N.E. 630 (1925), Judge Pound said:

> "As the mother is the joint guardian of the children with her husband, if the wife has selected her own domicile, as she may whenever it is necessary and proper for her to do so, and the children live with her, the domicile of the mother is for the time being the domicile of the children."

In reaching the conclusion that if the mother has a domicile separate from her husband, regardless of her reasons for so doing, and the children are with her, then the childrens' domicile follows that of their mother. It would seem that the Connecticut court, regardless of the confusion in the law, is following the more modern trend as expressed in the Halvey case.

The Connecticut court would seem to have a more sound approach to the result reached, in its suggestion that the court of a state where a child actually resides is in the best position to determine the person in whose custody the child should, for his best interest, be placed.

An interesting case in point is *May v. May,* 233 App. Div. 519, 253 NY Supp. 606 (1931) where the Appellate Division, First Department, stated by way of dictum, supported, however, by ample authority, that there are two situations when a court is empowered to award custody of a child in a marital dispute; first, when the child itself is before the court, though neither of the parents are within the jurisdiction or before the court, *Finley v. Finley,* 240 N.Y. 429, 148 N.E. 624;

Matter of Throne, 240 N.Y. 444, 148 N.E. 630; *Matter of Hubbard*, 82 N.Y. 90; and second, when both parents are before the court, though the child be without the jurisdiction, *People ex rel Ludden v. Windsor*, 69 N.Y. Supp. 452, aff'd 61 App. Div. 614—*People ex rel Bellotti v. N. Y. Juvenile Asylum*, 57 App. Div. 383, 68 N.Y. Supp. 279. The New York Court points out that the latter is true ". . . merely because the parties are personally before the court, which, by virtue of its control over such persons, may enforce its commands with respect to each."

It will be noted that in the present case since neither the child itself nor the defendant were personally before the New York Court, the facts do not come within either of the situations noted in the May case. Hence the New York Court apparently was without authority in the first instance to decree custody of the child and so much of the decree as purported to award custody to the plaintiff was not entitled to be given full faith and credit by the Connecticut Court.

Another line of authority which would have sustained this decision is exemplified by *Commonwealth ex rel Rogers v. Daven*, 298 Pa. 416 148 Atl. 524 (1930). A North Carolina Juvenile Court having jurisdiction of the parties and the minor children had given custody of the children to the father. The mother, ignoring the judgment, took the child ren to Pennsylvania. A representative of the North Carolina Court served a writ of habeas corpus bringing the children before a Municipal Court in Pennsylvania, and the children were remanded to the Juvenile Court of North Carolina. The order was affirmed on appeal to the superior court. On further appeal the decision was reversed.

In so deciding, the court said:

> "Whenever a court is called upon to award the custody of a child, the guiding star is its welfare. And the Court where the matter is pending must decide that grave question on its own best judgment, unfettered, but not necessarily uninfluenced by a prior adjudication."

It is noted that the New York Courts, as in *Ansarge v. Armour,* 267 N.Y. 492, 196 N.E. 546 (1935), do not follow this line of authority and there is no indication that the Connecticut Court considered it.

It would appear that had the Connecticut Court followed the authority as expressed in either the May or the Daven case, all questions relative to the domicile of the defendant and the child would have been unnecessary.

OPENING DEFAULT DENATURALIZATION JUDGMENTS UNDER FEDERAL RULE 60(b)

Defendant, a native of Germany, was naturalized in 1933. In 1942 a default judgment of denaturalization was entered against him solely on the basis of allegations made in the government's complaint, without the presentation of any supporting proof. In 1946 defendant filed a petition to set aside this default judgment. The petition alleged that when the complaint was served defendant was sick and without funds to employ counsel; that before the expiration of the statutory sixty day time to answer he was arrested on charges of violating the Selective Service Act and held in prison because of inability to furnish bail; that a letter he had written to the Civil Liberties Union, asking its aid in defending the denaturalization suit, was taken from him by F.B.I. agents and never mailed; that the lawyer assigned to defend in the Selective Service case promised to aid defendant in the denaturalization proceedings, but failed to do so; that the U.S. Supreme Court reversed defendant's conviction in the Selective Service case, *Keegan v. U.S.*, 325 U.S. 478, 89 L.Ed. 1745, 65 S.Ct. 1203 (1945), and a sedition charge later brought against him was dismissed, *U.S. v. McWilliams*, 82 App. D.C. 259, 163 F.2d 695 (1946), but that defendant had been kept in prison and was ordered deported because of the denaturalization judgment, *Citizens Protective League v. Clark*, 81 App. D.C. —, 155 F.2d 290 (1946), cert. den. 329 U.S. 787, 91 L.Ed. 674, 67 S.Ct. 354 (1946).

The District Court denied the petition, *U.S. v. Klapprott*, 6 F.R.D. 450 (1947), and the Circuit Court of Appeals affirmed, 166 F.2d 273, (CCA 3d 1948), Stephens, J. dissenting. (An excellent—and prophetic—note, *Denaturalization by Default Without Proof of Fraud or Illegality*, 48 Col.L. Rev. 957, deals with the Circuit Court's decision in this case.) Certiorari was granted by the Supreme Court, 334 U.S. 818, 92 L.Ed. 1041, 68 S.Ct. 1086 (1948), which reversed the

judgments below and remanded the cause with instructions to set aside the default and grant a hearing on the merits, *Klapprott v. U.S.*, 335 U.S. 601, 93 L.Ed. 279, 69 S.Ct. 384 (1949).

Five opinions were delivered in the case, with a majority agreeing only upon the result. Three separate reasons were stated for reversal. The opinion of Justice Black, joined by Justice Douglas, stated that, ". . . courts should not in §738 [the "denaturalization" statute involved in this case, Oct. 14, 1940, c. 876, Title I, Subchap. III, §338, 54 Stat. 1158, 8 USCA §738] proceedings deprive a person of his citizenship until the Government first offers proof of its charges sufficient to satisfy the burden imposed on it, even in cases where the defendant has made default in appearance . . .," but suggested that even if all facts alleged in the complaint were taken as true, the government failed to establish a case for denaturalization in view of the criteria set forth in *Schneiderman v. U.S.*, 320 U.S. 118, 87 L.Ed. 1796, 63 S.Ct. 1333 (1943), *Baumgartner v. U.S.*, 322 U.S. 665, 88 L.Ed. 1525, 64 S.Ct. 1240 (1944), and *Knauer v. U.S.*, 328 U.S. 654, 90 L.Ed. 1500, 66 S.Ct. 1304 (1946). The opinion further asserted that even if the judgment is not void because entered in the absence of proof, it should be set aside on the ground that the circumstances justified relief under Rule 60(b) of the Federal Rules of Civil Procedure.

Justice Rutledge, joined by Justice Murphy, agreed that proof should have been required before denaturalization, but took the view that the judgment was void and the court should order the complaint dismissed instead of granting a hearing on the charges therein. This opinion is in accord with the basic feeling, expressed in their dissent in the *Knauer* case, *supra*, that denaturalization proceedings are invalid under any circumstances.

Justice Burton, whose opinion apparently tipped the scales in favor of reversal, disagreed with the contention that a default judgment in denaturalization proceedings is invalid without the production of proof, but stated that under the "special circumstances" of this case, the default should be set aside and the defendant granted a hearing on the merits.

Justice Reed, in a dissent joined by Chief Justice Vinson and Justice Jackson, contended that a default denaturalization judgment requires no presentation of supporting proof, and that defendant's allegations were insufficient to show more than the "excusable neglect" stated in Rule 60(b) as a reason for opening up the judgment. This ground of relief, being subject to the one year limitation of Rule 60(b), was not available to defendant. Justice Reed's opinion also differs from that of Justice Black in its suggestion that the facts set forth in the original complaint were sufficient to establish the government's case for denaturalization.

Justice Frankfurter felt that a denaturalization judgment could be held valid though obtained by default, but agreed with the majority that this was not a simple case of "excusable neglect" for which relief was barred by the one year limitation of Rule 60(b). However, he dissented from the majority's disposition of the case since he contended that the defendant was entitled to nothing more than an opportunity to satisfy the trial judge that the allegations in his petition were true and justified reopening the case. He suggested that the government had not had a fair chance to rebut the defendant's allegations since the original demurrer was good in law at the time it was made (under the former Rule 60(b) amended after the lower courts had considered the case) and the government would doubtless have contested such allegations by proof had it known that the Supreme Court would interpret the new rule 60(b) as it did.

A majority of the court thus supported a denaturalization judgment obtained by default, even when no proof was produced to support the charges of fraud in the naturalization. The statute (8 USCA §738) is silent as to whether proof must be presented at the denaturalization proceeding, although its provisions for service by publication (¶ (b) of §738) support, by implication, the validity of a default judgment, per se.

The majority in this respect refused to extend the analogy between denaturalization and criminal actions which has been suggested recently in the *Schneiderman, Baumgartner*

and *Knauer* cases. It is true that Justice Black's opinion contends that, because these cases laid down the requirement of "clear unequivocal and convincing" proof (a burden of proof "substantially identical" to the proof beyond a reasonable doubt required in criminal cases), judgments of denaturalization, like criminal convictions, must be supported by sufficient evidence to sustain this burden, even when the defendants have defaulted in appearance. Justice Reed indicates that the fact that the *Schneiderman* case was contested is sufficient to distinguish it, and his opinion contends that the rule therein stated as to the required degree of proof has no application to default judgments where the default is to be regarded as equivalent to an admission of well pleaded allegations.

The reasoning common to all three majority opinions is based upon the presence of "special circumstances" which justify opening up the default judgement. The relief so granted is made to depend upon the application of the amended Rule 60(b) which, by operation of Rule 86(b) became effective March 19, 1948, after the lower courts decided this case. The majority of the court appears to have agreed with Justice Black that the defendant's allegations, not controverted, indicated an "extraordinary situation." This, Justice Black declared, is not to be classified as mere neglect, but is within the meaning of that portion of the amended rule which allows reopening a judgment for, ". . . any other reason justifying relief from the operation of the judgment . . ." This latter portion of Rule 60(b) is not subject to the one year time limitation which applies when relief is sought for "excusable neglect." The decision is silent as to the exact nature of the "special circumstances" needed in any given case to bring it within the "any other reason" portion of the rule. In this particular case the prolonged incarceration of defendant under ". . . charges the Government was unable to sustain . . ." (Black, J. at 335 US 607, 93 L.Ed. 284, 69 S.Ct. 387), the letter written by and taken from defendant, the lawyer's failure to defend the denaturalization suit as he promised, defendant's poverty, ill health, marriage

to an American citizen (with a child by such marriage), and the protracted series of trials and appeals in the Selective Service, sedition and deportation actions may each have some weight in the court's consideration. (Justice Frankfurter's dissent would allow relief only if defendant supported the "psychological argument" of preoccupation with the other actions which distracted him from the defense of the denaturalization suit.) These contributing factors are chronologically arranged at some length in Justice Black's opinion. The opinions show little doubt as to the propriety of applying the amended Rule 60(b) to the case in the Supreme Court, despite the fact that it did not become effective until after the lower courts had passed upon the petition under the prior rule. Rule 86(b) made the new Rule 60(b) apply to pending actions unless the application would "work injustice," and there was no apparent injustice to the government in such application. The new rule extends the six month time limitation of the former rule to one year in cases of ". . . mistake, inadvertence, surprise or excusable neglect . . ." and applies the one year limitation to cases where fraud or newly discovered evidence are alleged as reasons for reopening the judgment. In addition the amended rule adds as grounds for relief, ". . . that the judgment is void . . .," ". . . the judgment has been satisfied, released, or discharged . . .," and ". . . any other reason justifying relief from the operation of the judgment . . ." The latter grounds are not made subject to any time limitation.

The Supreme Court made no mention of the additional provision in both the old and new Rule 60(b) that the rule does not affect the historic equity jurisdiction of the Federal Courts to give relief when the petition was treated as a bill of review. Both the District Court and the Circuit Court of Appeals devoted considerable space in their opinions to discussion of this aspect of the rule, both courts denying such equitable relief on the ground that the defendant had been guilty of laches in not filing his petition for four and one-half years following the original denaturalization judgment. A possible explanation of the highest court's failure to discuss the point may be the presence of the word "independ-

ent" in the new rule which now reads, ". . . This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding . . ." The court may have considered that the petition was to be taken as a motion made in the original denaturalization proceedings rather than as in the nature of a bill of review in an "independent" action.

Apparently every petition for relief under the "any other reason" part of Rule 60(b) must be considered in the light of the particular facts and circumstances involved in each separate case. Where denaturalization proceedings are concerned, the principles underlying the *Schneiderman* and *Baumgartner* decisions will be applied to require particular scrutiny of the bases for depriving a defendant of his citizenship.

The court's decision, however, leaves unsettled several problems as to the application of Rule 60(b) in denaturalization cases. For example; what would have been the result in this case if the government had put in proof? Does this case truly present a very extraordinary set of facts not likely to occur in many other cases? When does a given petition for relief fall within the "excusable neglect" portion of the rule and thus become subject to the one year time limitation, and when must the "any other reason" part of the rule be applied? Finally, in such cases is the court's basic consideration the nature of the proof presented or the manner in which the judgment was obtained? As to the last question, it seems evident that in the present case, at least, the decisive factor was the manner in which the defendant was denaturalized rather than the character of the proof presented.

PICKETING ON PRIVATE AND "QUASI-PUBLIC" PROPERTY

Defendants in an orderly manner picketed the stand of Union News Co., lessee, within the Pennsylvania Station in New York City. Complainant, a New York State railroad policeman, directed them to cease and, upon their refusal to do so, arrested them and charged them with disorderly conduct under §722, ¶2, of the Penal Law. New York City Magistrate's Court dismissed complaint and discharged defendants. *People v. Barisi,* 193 Misc. 934, 86 N.Y.S. 2d 277, 15 Labor Cas. ¶64, 890 (1948) (opinion by Andrews, M.) The court, noting that " 'The right to picket and publicize a labor dispute is a protected constitutional right,' " *Thornhill v. Alabama,* 310 U.S. 88, 102, 84 L.Ed. 1093, 60 S.Ct. 736 (1940), referred to *Marsh v. Alabama,* 326 U.S. 501, 506, 90 L.Ed. 265, 66 S.Ct. 276 (1946), and concluded that, ". . . By opening up their property to the general public, the owners of the station have made it a quasi-public place, and as such their ownership is [in the words of the *Marsh* case] 'circumscribed by the constitutional rights of those who use it.' " The *Marsh* case held that the right of Jehovah's Witnesses to distribute religious pamphlets in a company-owned town was constitutionally protected against a state statute which made refusal to leave private property when ordered to do so a violation of law.

The evidence showed no acts which would have justified defendant's arrest if the picketing had taken place in a public thoroughfare; so the court's refusal to apply §722 ¶2, which makes guilty of disorderly conduct any person who ". . . Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others . . ." seems justified by the absence of actual disorder. *People v. Muller,* 286 N.Y. 281, 36 N.E. 2d 206 (1941). But the question remains whether the picketing in the railroad station was, *per se,* disorderly conduct.

It has been held that there is no disorderly conduct within the meaning of §722 in the case of "quiet and orderly" solicitation of taxicab fares in a railroad station despite the railroad's objection, *People v. Swald*, 190 Misc. 239, 73 N.Y.S. 2d 399 (1947), *People on Inf. DeFazio v. Yost*, 61 N.Y.S. 2d 447 (1946), nor in the case of "quiet and orderly" newspaper selling in privately owned subways. *People v. Goldstein*, 150 Misc. 101, 268 N.Y. Supp. 50 (1933).

The decision in the *Barisi* case is apparently limited to situations where the picketing is directed against the lessee and not the owner of the premises, for the court, after mentioning the "quiet and orderly" deportment of the pickets, observed that it was dismissing the complaint ". . . Since the picketing was not against the Pennsylvania Railroad but against a lessee thereof . . ." It may be questioned whether this distinction between lessee and owner is well taken, particularly in view of the constitutional principle asserted. But, even assuming the validity of such distinction, the application of the asserted constitutional limitation might well lead to some astonishing results. Will it follow that orderly picketing against the lessee of space in *any* building so devoted to the public use that the owner cannot exclude *any* orderly person (whether or not such person has business therein) will not be disorderly conduct when it occurs in a labor dispute involving the lessee, even though carried on inside the building and against the owner's objection? Will this principle be applied to an arcade building, to small leased news and refreshment stands in office buildings, to the corridors within such buildings, or to the aisles of department stores which lease space to independently owned departments?

It has been held that refusal of a person standing on private property to "move on" as directed by police constitutes disorderly conduct within §722, ¶2. *People v. Hipple*, 263 N.Y. 243, 188 N.E. 725 (1934). In that case the private property involved was a doorway of a building where a strike was in progress. The court ruled that although the case failed to come within a strict construction of ¶3 of §722 (which prohibits congregating with others ". . . on a public

street . . ." and refusing ". . . to move on when ordered by the police . . . ", it did fall within ¶2 of the section. But *Cf. People on Inf. Planczunas v. DeStefanis,* 34 N.Y.S. 2d 52 (1934) holding that mere refusal to leave private property in the absence of an actual breach of the peace did not constitute disorderly conduct.

Upon similar considerations, picketing upon private property in non-labor disputes has been enjoined. In *Sea Gate Ass'n. v. Sea Gate Tenants Ass'n.,* 168 Misc. 742, 6 N.Y.S. 2d 387 (1938), Aff'd. 256 App. Div. 949, 11 N.Y.S. 2d 332 (1939) the court held that while the law sanctions peaceful picketing in public places, there is no authority to support picketing upon private property where no labor dispute is involved.

Cases arising from picketing directed against lessees of *publicly* owned property show divergent opinions as to the application of §722. Thus, where pickets against a restaurant concession on the New York World's Fair grounds refused to leave the grounds when ordered to do so by police who tendered return of admission fees paid by them, they were convicted under §722, ¶2. *People on Complaint of Koester v. Rozensweig,* 171 Misc. 702, 13 N.Y.S. 2d 795 (1939). The court, however, observed that as the picketing was orderly, there would have been no violation of §722 had it taken place on a public thoroughfare instead of on the Fair grounds which, being leased to World's Fair 1939 Incorporated and accessible to the public only upon payment of an admission fee or under an official pass, was in effect private property. The right of proprietors of theatres and similar establishments to evict anyone committing undesired acts within, upon tender back of admission charges paid, seems well supported, *Marrone v. Washington Jockey Club,* 227 U.S. 633, 57 L.Ed. 679, 33 S.Ct. 401, 43 LRA (NS) 961 (1913), and this might be a distinguishing feature. Likewise the conviction under §722, ¶2, of female pickets clad in bathing suits who refused to cease picketing a restaurant concession at Jones Beach State Park may be distinguished by the fact that their attire and activities attracted a crowd of sev-

eral thousand spectators whom it took twenty minutes to disperse after the pickets' arrest. *People v. Richards,* 177 Misc. 912, 31 N.Y.S. 2d 457 (1941).

On the other hand, pickets, in excess of the six permitted by police, who entered LaGuardia Airport, which was open and freely accessible to the public, were held not to have violated §722, ¶2, by crossing the police line for the purpose of picketing a hanger leased to an airline against which there was a strike in progress. The court refused to pass upon the contention that the airport was "private property," merely deciding that since the city department which had jurisdiction of the field had never refused admittance to the pickets, the police had no authority to forbid their entrance. *People v. Remsen,* 188 Misc. 21, 63 N.Y.S. 2d 860 (1946).

Somewhat analogous to situations arising under §722 are cases involving rules and regulations of administrative agencies governing public parks and playgrounds. Charges of violating such rules by the picketing of concessions within such premises have been dismissed by courts which declared that, there being a fundamental right to picket, the courts must prevent its curtailment. *People v. Ribinovich,* 171 Misc. 569, 13 N.Y.S. 2d 135 (1939) (Coney Island), *People on Inf. Pignataro v. DeJulis,* 174 Misc. 836, 21 N.Y.S. 2d 995 (1940) (Glen Island Park). See also; Teller, *The Law Governing Labor Disputes and Collective Bargaining* (1940 and 1947 Supplement) §§115, 116 and 134 with cases there cited.

The *Barisi* case follows many recent cases which have identified picketing and free speech. See Teller, *op. cit.* (1947 Supplement), §136, p. 70 and Teller, *Picketing and Free Speech,* 56 Harv. L. Rev. 180 (1942). But more than extending the resultant constitutional protection of picketing the case seems to transfer it to a new plane by denominating as "quasi-public" what conventionally would seem to be private property. However, it remains to be seen whether superior courts will approve this development by a Magistrate's Court and how far the right to picket will be extended when it comes into conflict with the rights of owners and occupants of private property which has not been "devoted to public use" to the same extent as Pennsylvania Station.

TORT LIABILITY FOR PRENATAL INJURIES

Plaintiff sought recovery for prenatal injuries caused by the fall of her mother and the resulting premature birth of herself. The plaintiff alleged that her mother, a passenger on a bus owned and operated by the defendant, had been injured by a fall resulting from negligence in the operation of the bus by defendant's servant. The defendant demurred on the ground that a person has no cause of action for prenatal injuries. The trial court sustained the demurrer. On appeal, the Court of Appeals of Ohio, Third District, reversed, holding that an infant, as an "existing viable child" in its mother's womb has a cause of action after birth for injuries caused by the negligence of another. *Williams v. Marion Rapid Transit*, 82 N.E. 2d 423, 82 OA 445 (Ohio 1948).

The court recognized its opinion to be against the weight of authority, particularly *Restatement, Torts,* 869 (1939) and contrary to the earlier case of *Mays v. Weingarten*, 82 N.E. 2d 421 (Ohio App. 1943) decided by the Court of Appeals of Ohio, Seventh District. In thus rendering a decision contrary to the common law rule the court said: "The duty of a court, within a limited sphere, should be not so much in extracting a rule of law from the precedents as in making an appraisal and comparison of social values, the result of which may be decisive in determining what rule to apply." No statute was involved in the principal case. The common law rule denying a person recovery for his prenatal injuries is said to be based upon the theory that there is no person in being at the time of the accident to whom the defendant owes a duty of care. 52 Am. Jur. 98.

The court in the principal case held that the trial court erred in sustaining the demurrer on the sole ground that plaintiff was unborn at the time of the injury. Relying on a distinction said to be made by medical science between the

non-viable and viable stages of the foetus, the court reached the conclusion that the plaintiff, at some stage before birth, was a person in being, entitled to immunity from tortious personal injury.

In *Mays v. Weingarten* supra, distinguishable from the principal case only in the manner in which the mother's injuries were sustained, the other Ohio court, following the general rule, had held that no action for prenatal injury was known at common law and denied recovery. The court overruled an argument by plaintiff that an unborn child was a "person" within the meaning of an Ohio constitutional provision guaranteeing the availability of courts and remedies for injuries.

In *Drobner v. Peters,* 232 N.Y. 220, 133 N.E. 567 (1921) the New York Court of Appeals, Judge Cardozo dissenting, decided in accordance with the weight of authority, that an unborn child had no right of immunity from personal harm. The court suggested reasons for the rule to be: ". . . lack of authority; practical inconvenience and possible injustice; no separate entity apart from the mother and therefore no duty of care; no person or human being in esse at the time of the accident." (232 N.Y. 220, 222).

The court recognized that the law imputes a legal personality to an unborn child as a rule of property and that, the life of the unborn is protected by the criminal law; but the court said, "Rights of ownership of property do not connote a duty of personal care to the inchoate owner, nor does the crime of causing the death of an unborn child connote liability to the child for personal injuries." The court although indicating that sympathy and natural justice might point to recovery took the view that the injuries were, when inflicted, injuries to the mother.

It therefore would appear that in New York, an unborn child has not such an independent personality as to be immune from the tortious conduct of another. However, at the close of the opinion in the *Drobner* case, the court said, "The conditions of negligence law at the present time do not suggest that the reasons in favor of recovery so far outweigh those which may be advanced against it as to call for judicial

legislation on the question." In view of this language, developments in the law of negligence over the past twenty-five years suggest the possibility that the rule of the *Drobner* case may be subject to some modification. The principal case shows a dissatisfaction on the part of at least one court with the prevailing rule and suggests a rationale for a revision.

C. A. L.

Recent Decisions

CONTRACTS—ACCEPTANCE BY MAIL—EFFECT OF POSTAL REGULATIONS ON REVOCATION — Plaintiff received by mail certain purchase orders for ship propellers. These orders were signed and deposited in the mail by plaintiff on March 25, 1945. Plaintiff then discovered price quoted in contract represented only one set of propellers and that the contract called for two sets. On March 16 plaintiff telegraphed revocation of his acceptance.

The acceptance did not arrive until several days after notice of revocation. *Held,* that the acceptance was not effective to constitute a binding contract: *Dick v. United States* 82 F. Supp. 326 (Ct. Cl. 1949).

In this action in the Court of Claims, the court based its decision on United States Post Office Regulations 1913 Sections 552, 553 which provide a procedure by which the sender of a letter may secure its return if it has not been delivered. The court quoted a statement from 17 C.J.S. Contracts Section 52, page 405, "'. . . that a letter which has been returned under such regulations does not constitute a binding acceptance.'"

Traders' National Bank v. First National Bank 142 Tenn. 229, 217 S.W. 977 (1920) was cited as supporting this view. This case held that the acceptor of a bank draft may effectively revoke his acceptance by withdrawing it from the mail before it is received. These cases rest on the theory that the acceptor must place his acceptance beyond his control before it becomes binding.

As pointed out in the dissenting opinion, the decision in the *Dick* case is at variance with eminent authority. The ordinary rule is that if mail is the authorized means of reply, the acceptance is effective when properly addressed and mailed. Restatement of Contracts, Section 67; Williston on Contracts, Rev. Ed. Vol. 1, Section 81.

Section 86 of Williston says that "It is not important that the acceptor has the power to withdraw his acceptance from the mails." Similarly, Richardson, in the Principles of the Law of Contracts at p. 29, Section 35, says, "The fact that the acceptor intercepts his letter of acceptance and withdraws it from the mail is without effect . . ."

Both authors cite numerous authorities for their position which also finds support in the necessity for providing some fixed point at which legal relationships come into effect.

Richardson states the rule governing contracts by telegraph is the same as that for letters. Richardson p. 30, Section 37. It is pointed out in Section 86 of Williston that the ability in the sender to prevent its delivery by timely action does not effect a revocation of a telegraphic acceptance.

On the basis of the foregoing and the uncertainty introduced into what were thought to be settled rules of law, the decision in the principal case does not seem to meet the objections raised in the dissenting opinion. It would be better to change the rules entirely by making an acceptance operative on its receipt. To permit the settled rules of contracts to be altered by a change in Postal Regulations is to introduce uncertainty where only certainty should exist.

CONTRACTS—ARBITRATION CLAUSE — EFFECT ON PERIOD OF TIME WITHIN WHICH CLAIM MAY BE MADE — Petitioner, a shirt manufacturer, bought shirting material from respondent under a contract that provided for arbitration if the parties should disagree. The contract contained the following provision: "All claims must be made within ten days. No claims allowed after goods are out." Petitioner alleges that, after the shirts had been made and were sold to retailers, they were returned because the material had an odor, were not properly pre-shrunk, and the dye was not firm. Accordingly, the petitioner demanded arbitration, claiming that the defects were latent and not discoverable until after use by the customers. Respondent refused. *Held,* that the clause "All claims must be made within ten

days," was not a limitation of the time within which an action may be brought and did not preclude petitioner from demanding his contractual right to arbitrate. *Matter of Raphael and Silberberg*, 86 N.Y.S. 2d 421 (1949).

The Court distinguished *Matter of Kramer and Uchitelle, Inc.*, 288 N.Y. 467, 43 N.E. 2d 493 (1942) and *Matter of Wenger and Co., v. Propper S.H. Mills*, 239 N.Y. 199, 146 N.E. 203 (1924) which respondent relied upon as controlling. In the *Kramer* case the contract was frustrated by an act of the Federal Government and the Court held, "When the contract was at an end the provision for arbitration no longer existed or had any force whatever." The contract herein was not frustrated. In fact, a proceeding to enforce arbitration presupposes a valid and existing contract. *Civil Practice Act, Section 1450.* In the *Wenger* case the parties had agreed to arbitrate all disputes. The defendant refused, alleging that the point in dispute was a matter of law, not fact, and should be decided by the courts. It was held that the arbitration clause was broad enough to cover questions of both law and fact, and since the parties by their contract had selected their tribunal, the Court should not interfere. This would seem to support the contention of the petitioner rather than the respondent.

The Court implied that it would be justified in refusing to compel the parties to proceed to arbitration if the claim were unconscionable or frivolous. Otherwise, the parties are bound by their agreement and it is for the arbiters to decide whether a claim made after the ten-day period should be allowed. Cf. *Matter of Tuttman et al. v. Kattan, Talamas Export Corp.*, 274 App. Div. 395, 83 N.Y.S. 2d 651 (1948).

The holding in the principal case is consonant with the attitude of the Court of Appeals toward arbitration clauses in contracts, as evidenced by *Matter of Lowenthal*, 233 N.Y. 621, 135 N.E. 944 (1922); *Matter of Hosiery Manufacturers Corp. v. Goldston*, 238 N.Y. 22, 143 N.E. 779 (1924) and confirmed by *Matter of Lipman*, 289 N.Y. 76, 43 N.E. 2d 817 (1942). In the *Lowenthal* case it was held that a receiver of one of the parties to a contract providing for arbitration of differences was entitled to an order directing that arbitra-

tion proceed. A similar result was reached in the case of *Hosiery Manufacturers Corp. v. Goldston, supra,* the court finding that an assignee of one of the parties may take advantage of the arbitration clause in the contract between his assignor and the defendant. The lapse of two decades has not seen any change in the attitude of the court that arbitration clauses are express contractual conditions, binding on both parties. In 1942 in the *Lipman* case the Court of Appeals unanimously affirmed a finding of the Appellate Division that disputed issues of law or fact arising subsequent to the contract lie exclusively within the jurisdiction of the arbiters.

CRIMES — CONFESSION — EVIDENCE — Defendant was convicted and sentenced to death for participation in a felony murder. After eight hours of questioning by the police, he had confessed. He had not been arraigned until 48 hours after seizure. Before arrest and while in a reformatory, he had persistently denied participation in or connection with the crime. On trial, the only evidence of guilt was the confession, which defendant swore had been forced from him by repeated police beatings. The actual killer testified he had falsely named defendant to avoid further beatings and defendant offered an alibi. Police officers denied mistreatment, but the report of the jail physician indicated that defendant had suffered some physical injuries not explained by the people. *Held,* that the judgment should be reversed and a new trial ordered. *People v. Valletutti,* 297 N.Y. 226, 78 N.E. 2d 485 (1948).

In a four-three decision by the Court of Appeals, the majority said: "Admissions freely and voluntarily made by a person charged with a crime, are not only acceptable, but convincing evidence of his guilt. But an involuntary 'confession' is by its very nature, evidence of nothing." Any reasonable doubt, therefore, as to the voluntary nature of a confession must be resolved in favor of a defendant. The court dealing with the weight of evidence in a capital case considered that the circumstances here created a reasonable doubt as to the voluntary nature of the confession.

A long line of cases has established the rule in this State to be that when the question is raised as to the admission of a confession on the ground that it was not voluntary made, it is the duty of the trial judge, in the first instance, to hear evidence on this point and decide. If there is no dispute that the confession was extorted by force or fear, or if a verdict that it was freely made would be against the weight of evidence, he should reject it. When, however, upon this preliminary examination, an issue of fact is raised as to the voluntary nature of the confession, it may be admitted and the question left to the jury with the instruction that they should reject it if, upon the whole evidence, they believe it was not the voluntary act of the defendant, *People v. Doran,* 246 N.Y. 409, 159 N.E. 379 (1927), reviewing *People v. Fox,* 121 N.Y. 449, 24 N.E. 923 (1890); *People v. Brasch,* 193 N.Y. 46, 85 N.E. 809 (1908), "It was the duty of the court preliminarily to rule on the admission of evidence of the confessions. It was proper in case an issue of fact arose in regard to their character and the circumstances which surrounded them to submit such issue to the jury at the close of the entire case."; *People v. Randazzio,* 194 N.Y. 147, 87 N.E. 112 (1909), "If there is *no* conflict in the evidence with reference to threats, the question of the admission of confessions is for the court, but *if there is a conflict* the question ultimately is for the jury."; *People v. Schermerhorn,* 203 N.Y. 57, 96 N.E. 376 (1911), "The question whether these statements were voluntarily made was fairly submitted to the jury and the verdict implies that these confessions were regarded as freely made."; also *People v. Trybus,* 219 N.Y. 18, 113 N.E. 538 (1916); *People v. Nunziato,* 233 N.Y. 394, 135 N.E. 827 (1922).

The *Valletutti* case appears to be in line with these and other prior New York State decisions concerning the admission of confessions, its distinction perhaps lying in the fact that there was such an even division of opinion with respect to the voluntary character of the confession. The minority, in a strong dissenting opinion, felt that the People's evidence met the evidence of the defendant "as oath against oath" *People v. Barbato,* 254 N.Y. 170, 172 N.E. 458 (1930), and

thus presented a fair question of credibility for the jury to decide whether or not the confession was voluntary. In reaching this conclusion, they emphasized the fact that defendant failed to make timely complaint and indicated that his wounds could have been self-inflicted. *People v. Barbato,* supra, and *People v. Weiner,* 248 N.Y. 118, 161 N.E. 441 (1928) were clearly distinguishable, the dissent felt, because in such cases marks and bloodstains were proved to have appeared immediately after police questioning.

The distinction in the *Valletutti* case seems to be that in a criminal trial, Section 410 of the Code of Criminal Procedure provides that if the trial judge comes to the conclusion that the evidence is insufficient to convict, he may so instruct the jury and they must follow the advice. On appeal, the appellate court usually does what the trial court should have done in the first case. In the principal case, the majority obviously think the case should be dismissed, *People v. Valletutti,* supra at p. 233, "The conclusions stated herein may seem logically to lead to a dismissal of the indictment as well as a reversal of the judgment." However, they sent it back for a new trial. The effect of the Code provision, supra, therefore, seems to be that only where a conviction is erroneous and the defendant could not be convicted of the crime, can the court dismiss. Where there has been an actual conviction, there appears to be a question as to whether they can dismiss. Thus here, although convinced, the Court of Appeals sent the case back for a new trial, with the remark that "it is the usual practice of this court to order a new trial in such situations." (p. 233); all of which seems to leave the defendant dangling in mid air. The procedural question involved, therefore, may well be more important than the actual decision arrived at. Why should there not have been a dismissal?

DOMESTIC RELATIONS — ESTABLISHMENT OF VALIDITY OF MARRIAGE — BURDEN OF PROOF. — Decedent, though he could not lawfully remarry without court permission because of a divorce decree procured by his former wife prohibiting such remarriage, began in

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1915 to live openly as man and wife with petitioner, who alleges she is his lawful widow. Three children were born of this relationship though none were born of the former marriage. Petitioner seeks to establish lawful widowhood by the testimony of her sister to the effect that the couple took trips to New Jersey and Connecticut "many times." Petitioner argued that the presumption in favor of the legitimacy of children should produce a finding of a valid marriage of the parents and cited *Matter of Sokoloff's Estate,* 166 Misc. 403, 2 N.Y.S. 2d 602 (1938) as standing for that proposition. *Held,* petitioner had not sustained the burden of establishing a marriage. *In Re Cooke's Estate,* 85 N.Y.S. 2d 104 (1948).

The court decided that the burden of establishing the marriage by competent evidence rests upon the alleged widow, and the fact that there are issues of the relationship will not shift the burden to the other side to disprove the marriage. Marriage in violation of Section 8 New York Domestic Relations Law, if valid where contracted, will be recognized in New York; but it was not shown that petitioner's sister had "any personal knowledge of such trips or the conduct of the parties thereon."

The court could not agree with the opinion in the *Sokoloff* case that, given testimony of travel, "It would place no strain on the imagination to suppose they may have gone to New Jersey or Connecticut or some other state. In any event, there was no indication in the record that they did not." The court added that there was no evidence of a ceremonial marriage here as in the *Sokoloff* case and in *Matter of Van Valkenberg,* 184 Misc. 949, 54 N.Y.S. 2d 897 (1945).

In the *Sokoloff* case the decedent entered a rabbinical marriage with Bertha Gurber one day after the filing of an interlocutory decree of divorce procured by his former wife, from which marriage one child had been born. He lived with Bertha until his death, almost 22 years, and they had one son, objectant, who opposed the grant of letters of administration to the issue of decedent's former marriage. The court held the ceremonial marriage invalid because the dissolution of the former marriage had not been effected by the interlocutory decree, citing *Pettit v. Pettit,* 105 App. Div. 312 93

N.Y.S. 1001 (1905). Since the final decree in that case prohibited remarriage, no valid marriage could be contracted by decedent in New York. However the court said that the law presumes legitimacy and every reasonable possibility of legitimacy must be disproved by the one asserting the illegitimacy, citing *Caujollie v. Ferrie,* 23 N.Y. 90 (1861); *Matter of Biersack,* 96 Misc. 161, 159 N.Y.S. 519 (1916), aff'd, 179 App. Div. 916, 165 N.Y.S. 1077 (1917).

Hence, it would appear that the burden is on the party to an alleged marriage to establish it, while as to the issue of such a marriage, the one alleging the illiegitimacy of the issue has the burden of proving it.

The existence of a marriage, not the legitimacy of the issue therefrom, was the question in the *Van Valkenberg* case. The decedent, while subject to a divorce decree prohibiting remarriage was a party with petitioner to a marriage ceremony in New York. Testimony was given that the couple had held themselves out as man and wife and had taken trips to New Hampshire and Florida. *Held:* a common law marriage had been established. The court employed language almost identical to that used in the *Sokoloff* opinion and said, "In the absence of a demonstration to the contrary, it must be inferred in support of presumptions of legitimacy and of the validity of this marriage . . ." that on one of the demonstrated trips the decedent and petitioner effectuated their continuing intent to marry.

The quantum of proof produced by petitioner in the *Van Valkenberg* case would appear to be sufficient to sustain the burden imposed by the principal case.

PROCEDURE — STIPULATION—ADOPTION PROCEEDINGS—REVOCATION OF CONSENT.—A mother interposed an objection to the adoption of her child. Prior to the adoption petition, the mother, in full possession of her faculties and with conscious knowledge of her action, had voluntarily signed a consent to the petition. Thereafter, the mother appeared in the hearing, objected to the proceeding, and requested that her stipulation be revoked. *Held,* that a

party may not revoke nor escape from a stipulation at his will, but is bound by the record until relieved by judicial action. *Kalika v. Munro,* 83 N.E. 2d 172 (Mass. 1948).

It is recognized that the court may in its discretion grant relief, *Brickson v. Raspperry,* 320 Mass. 333, 69 N.E. 2d 474 (1946). However, in the case at hand such was not done and despite the mother's objections the petition was approved and the decree of adoption entered.

The case of *Wyness v. Crowley,* 292 Mass. 461, 198 N.E. 758 (1935) presents substantially the same proposition. Here the mother alleging inability to care for the child, requested her physician to find foster parents and gave written consent to the adoption. The mother was not allowed to withdraw her consent to the adoption before entry of the final decree, though here the element of estoppel enters into the picture inasmuch as the foster parents had had the care of the infant for eighteen months.

Since there are no cases in point, the status of this precise situation in New York law is uncertain. In *Sperb v. Metropolitan El. Ry. Co.,* 57 Hun 588 (N.Y. 1890), 10 N.Y. Supp. 865, it is stated that where it appears that a stipulation was given unadvisedly and that the other party had not been prejudiced thereby, such stipulation will be set aside. In *Hallow v. Hallow,* 200 App. Div. 642, 193 N.Y. Supp. 460 (1922), it is stated that the court will relieve a party from a harsh stipulation, even when fully authorized.

New York Courts apparently choose a middle ground for it seems that they are willing to break into the contractual relation set up by the stipulation, yet will not do so when the element of estoppel is present. In this their stand is consistent with the *Wyness* decision (above). Yet we cannot state that the *Kalika* holding is typical of New York Law.

TORTS — INHERENTLY DANGEROUS OBJECTS — PROXIMATE CAUSE — INTERVENING FORCE.— Infant plaintiff was injured when a fireworks bomb exploded. Defendant fireworks company contracted with defendant agricultural society to provide a fireworks display at the fair to be held by the latter. The company was to

furnish an experienced pyrotechnist, and agreed to indemnify the society from liability for the condition of the fireworks, and for any act or omission by their agents. Employees of the company wrapped three defective bombs in paper, and placed them in an empty box which was left out in the firing area, along with other equipment. Three boys, who had entered the fair grounds without paying admission, wandered into the firing area. There they found the bombs and each took one home. One of the boys was plaintiff's brother. Before he reached home he was intercepted by plaintiff's mother. Seeing the bomb, she told her son he would have to take it back. She thought it was a dud, and instructed him to leave it outside of the house overnight. This he did not do. The next morning the infant plaintiff, finding the bomb in the house, took it outside to play with it. The bomb exploded and injured him. *Held*, there was sufficient evidence from which the jury could find the defendant fireworks company negligent; *Kingsland v. Erie County Agricultural Society*, 298 N.Y. 409, 84 N.E. 2d 38 (1949).

The possibility that the boys may have been trespassers on the fairgrounds is immaterial, because the bomb was an inherently dangerous object, *Travell v. Bannerman*, 174 N.Y. 47, 66 N.E. 583 (1903). "The degree of care required is commensurate with the risk involved, depending upon . . . the dangerous character of the material and its accessibility to others, particularly children whose presence should have been anticipated; regardless of whether or not they are trespassers," *Beickert v. G. M. Laboratories*, 242 N.Y. 168, 151 N.E. 195 (1926); *Travell v. Bannerman, supra;* 35 C.J.S. Explosives Sec. 5; 22 Am. Jur., Explosions and Explosives Sec. 14, 18. There was no error in the submission of the question of proximate cause to the jury. Defendant will be held responsible for intervening forces which he could have foreseen, or for those which are normally incident to the risk created, *Carlock v. Westchester Lighting Co.*, 268 N.Y. 345, 197 N.E. 306 (1935). On this point the court was faced with its decision in *Perry v. Rochester Lime Co.*, 219 N.Y. 60, 113 N.E. 529 (1916), which was the basis for the dissent of Lewis, J. There the defendant had stored nitroglycerin caps

in chests on the bank of the Erie Canal in the city of Rochester. It stored them in a public place and in violation of law. Two boys carried away some of the chests, secreted them in a barn, and handling the contents the next day brought about an explosion which killed a child. The caps were not scattered about in such a way that the boys would be tempted by them, and defendant had done nothing to provoke theft. Although large quantities of the caps were stolen, and subsequently caused injury, not one of the intervening forces was within the range of reasonable expectation. The court felt that defendant's conduct in the present case was clearly distinguishable. The bombs were left exposed, from about 5:00 P.M. to 10:00 P.M., at the firing point where fireworks had been displayed on five consecutive preceding nights. The very purpose of the display was to attract crowds, children included. Defendants should have realized that this place would continue to be attractive to children. In the course of the opinion by Conway, J., the Court said: "Clearly the triers of the facts could find that defendants should have foreseen the probable result that children would take those apparently discarded bombs and that they, their playmates or some other child who might come in contact with the bombs would explode them and be injured thereby."

The intervention of the mother's alleged negligence cannot be said to relieve the defendant of liability as a matter of law. Whether her acts and instructions, after seeing the bomb, constituted an exercise of due care presented a question for determination by the jury.

TORTS—MUNICIPAL LIABILITY—DEPTH OF DEPRESSION — NEGLIGENCE.—Plaintiff brought a negligence action against the City of New York for injuries received when he stepped into a hole in a paved pathway while walking at night through a public park. After plaintiff had presented his proof, defendant city moved that the complaint be dismissed on the ground that there was no evidence that the hole was over "four inches" in depth or that it constituted a trap.

Held, that "the question of municipal negligence is one of fact for the jury; to be determined by all elements of the situation, and the depth of the depression cannot as a matter of law constitute or belie negligence per se." *Loughran v. City New York*, 298 N.Y. 320, 83 N.E. 2d 136 (1948).

The defendant had based its defense on a line of New York cases holding that the depth of a depression could as a matter of law determine liability. In *Lalor v. City of New York*, 208 N.Y. 431, 102 N.E. 431 (1913), a negligence action of a similar nature, testimony that the depth of a depression was exactly four inches was held insufficient in law to attribute negligence *per se* to the city.

The decision in the present case puts into specific language a general rule that has not been made clear in prior cases. In *Wilson v. Jaybro Realty & Development Co.*, 289 N.Y. 410 46 N.E. 2d 497 (1943), plaintiff brought suit after tripping over a hole in the defendant's sidewalk. The lower court dismissed the complaint on the theory that, as a matter of law, the evidence indicated a defect so slight as to preclude a claim that it was dangerous. The Court of Appeals reversed, holding that there was no rule that a hole in a public thoroughfare must under all circumstances be of a particular depth before its existence could give rise to a legal liability. In *Pratt v. Village of Seneca Falls*, 295 N.Y. 690, 65 N.E. 2d 332 (1946), judgment for plaintiff on a verdict at Trial Term was affirmed by a divided court in the Appellate Division although the proof showed a depression only 2¾" deep, which had existed for several years. The Court of Appeals affirmed, rejecting appellant's contention that there was no evidence of negligence sufficient to warrant the submission of the case to the jury. In *Lynch v. City of Beacon*, 295 N.Y. 872, 67 N.E. 2d 515 (1946), on substantially the same facts, an opposite result was reached. In that case, plaintiff's judgment at a Trial Term of the Supreme Court was reversed by the Appellate Division on the law and the facts and the complaint dismissed. That decision was affirmed by the Court of Appeals. The only distinction between the two cases is that, in the latter, the plaintiff was familiar with the condition.

Until the Loughran decision the exact status of the law in these cases was uncertain, and proof that a hole was less than four inches deep was recognized as some defense to liability. It now seems settled in New York that in actions arising out of falls attributed to municipal negligence in not filling in depressions, the question of liability revolves around all pertinent circumstances and cannot be disposed of solely by an inquiry into the depth of the depression.

TORTS — WRONGFUL DEATH — CAPACITY OF FOREIGN ADMINISTRATOR TO SUE WITHOUT ANCILLARY LETTERS. — The infant plaintiff died in Michigan. Her father was appointed administrator of her estate by a Michigan court and, without procuring ancillary letters, brought an action in New York to recover damages for her wrongful death allegedly occasioned by the use of one of defendant's products. *Held,* the action may be maintained: *Weiner v. Specific Pharmaceuticals Inc.,* 298 N.Y. 346, 83 N.E. 2d 673 (1949).

As a general rule a foreign administrator may not sue in the courts of this state without first obtaining ancillary letters. However, this case presents a question hitherto expressly left open by the courts in *Baldwin v. Powell,* 294 N.Y. 130, 61 N.E. 2d 412 (1945) and *Wikoff v. Hirschell,* 258 N.Y. 28, 179 N.E. 249 (1932). Does a foreign administrator, suing as special statutory trustee to recover damages for wrongful death for the benefit of designated persons, have the legal capacity to maintain such a suit in our courts? An administrator is a "special statutory trustee" if so constituted by the law of the place where the wrong causing death occurred. The test is, does the wrongful death statute upon which the suit is founded authorize him to sue "for the benefit of a designated person or group of persons." A statute authorizing recovery for the benefit of the estate of the deceased will bar a suit by the foreign administrator unless he procures the required letters. The statute involved in this suit is an example of the former type (20 Mich. Stats. Ann., Sec. 27.711, 27.712; 23 Mich. Stats. Ann., Sec. 27.3178 (185) subd 6).

The Circuit Court of Appeals for the Second Circuit was confronted with this problem in *Cooper v. American Airlines*, 149 F. 2d 355 (1945). The suit was based upon a Kentucky wrongful death statute which designated certain specified persons as the beneficiaries of the recovery. The statutory trustee, seeking to maintain the suit in a Federal court sitting in New York, was acting under letters issued by a Pennsylvania court, the state of the deceased's residence. The defendant airline was a Delaware corporation authorized to do business in New York as well as in Kentucky where the wrong occurred. The court discussed the lack of precedent in New York and made an exhaustive review of the existing authority. Having fully considered the law of New York, the court did not delay decision until the highest state court had passed on the matter, but rendered a decision in favor of the foreign representative, based upon what it thought the Court of Appeals of New York would decide when the issue was presented to that court. The soundness of that determination has now been demonstrated.

The primary purpose of the New York rule barring foreign administrators from our courts is to protect domestic creditors in cases where the foreign administrator sues to recover a fund in which such creditors may share. Obviously the reason for this rule is non-existent when the wrongful death statute involved makes no provision for recovery on behalf of the general estate. It follows that the rule should not be extended to such cases.

In adding certainty to what has long been thought to be the law, New York has followed the lead of a substantial minority of jurisdictions which have decided like cases in this manner. See, for example, *Pearson v. Norfolk & W. Ry. Co.*, 286 Fed. 429 (1923); *Reilly v. Pepe Co.*, 108 Conn. 436, 143 Atl. 568 (1928); *Knight v. Moline, E.M. & W. Ry. Co.*, 160 Iowa 160, 140 N.W., 839 (1913); *Ghilan v. Couture*, 84 N.H. 48, 146 Atl. 395 (1929); *Boulden v. Penn. R.R. Co.*, 205 Pa. 264, 54 Atl. 906 (1903); *Connor v. New York N. H. & H. Ry. Co.*, 28 R.I. 560, 68 Atl. 481 (1908).

Recent Books

THE LAW OF THE SOVIET STATE. By Andrei Y. Vyshinsky. Translated by Hugh W. Babb. Introduced by John N. Hazard. New York: Macmillan, 1948, Pp. xviii, 749.

This is the first English translation of the "handbook of those engaged in government" in Russia. Typical of the approach is the conviction that the end of Soviet socialist law is the protection of the toilers from exploitation and exploiters. Vyshinsky begins his analysis of Soviet law with an introduction outlining the basic concepts of Marxism-Leninism-Stalinism, and the steps leading up to the adoption of the Stalin Constitution in 1936. He then goes into a more objective analysis of the social organization of the U.S.S.R., the state organization, the court and prosecutor's office, the fundamental rights and obligations of U.S.S.R. citizens, and finally, the elective system. Vyshinsky's technique involves his interpretation and criticism of what the non-Marxists of history have believed and professed. Throughout, there is an extensive, if not logical, refilement of "capitalist systems." In general, he presents to the American reader an insight into the Soviet philosophy.

DRAFTING NEW YORK WILLS — LAW AND CLAUSES. By Harold D. Klipstein. New York: Baker Voorhis & Co., Inc., 1948. Pp. xxxviii, 730.

Mr. Klipstein, a member of the New York City Bar, presents a manual for lightening the labors of the profession in the drafting of New York wills. Throughout, the book is devoted exclusively to New York law and practice. The author begins with a checklist of matters to be considered in various situations, with references to the exact place where the pertinent law and clauses are to be found in the text. Each chapter is initially concerned with the law, giving the applicable statute or leading cases. This material is followed

by illustrative clauses, adaptable to almost any circumstance. The chapters themselves deal with various types of wills, non-dispositive provisions, the legal nature of the gift, the property, the beneficiary, trusts, powers, executors, and trustees. Following the text are complete indices to both the law and the clauses. In addition to this method of approach, ready reference may be made to each chapter by its separate table of contents.

NEW YORK UNIVERSITY SEVENTH ANNUAL INSTITUTE ON FEDERAL TAXATION. Albany, New York: Matthew Bender & Co., Inc., 1949. Pp. xvi, 1488.

This latest volume of New York University's annuals contains 135 papers delivered orally by many of the leading authorities on Federal taxation at the Institute's meeting in New York from November 9 to 18, 1948. "The Institute aims to be a yearly forum for reporting the most important research and opinion of leading tax practitioners and students of taxation." A broad consideration is given to everyday tax problems arising in corporate, partnership, and individual tax practice, especially in the light of the Revenue Act of 1948. Both actual and theoretical problems are discussed and analyzed. The papers are arranged under nine main headings: Business Tax Planning, Planning the Handling of Tax Cases, Planning For Capital Realizations, Appeal Practice, Planning For Corporate Distributions, Estate Planning, Tax Planning For Individuals and Partnerships, Planning For Reorganization, and Miscellaneous Planning. Although originally prepared for oral presentation, the papers, as printed, are supplemented by extensive footnotes, citations of applicable cases, and bibliographical references.

LAW AND SOCIETY, by Sidney P. Simpson and Julius Stone. 3 volumes (2 volumes received). St. Paul: West Publishing Co. Vol. 1, pp. xlviii, 692; Vol. 2, pp. xliii, 899.

These volumes are a collection of cases and readings, 14 years in the gathering, which deal with the law in its place

in social and economic development rather than as an isolated concept, treating law "as a vital part of cultural anthropology and the history of civilization." Aimed, at least in part, at making possible a course in a law school or elsewhere giving consideration to the law in these aspects, the scope attempted by the work is only partially indicated by its size: the first two volumes contain excerpts from more than five hundred readings and one hundred cases. Beginning with a discussion of the so-called "kin-organized" societies which existed in the founding days of Rome and Greece and which governed the conduct of our American Indians as well as numerous Germanic, Welsh, Jewish, Irish and Arabic tribes, the authors attempt through the use of these selected readings and cases to trace the role of law down to our present complex civilization. Despite this enormous range, however, "two-thirds of the book is devoted to the period since the Industrial Revolution, with particular emphasis on the present century and specific attention to the most pressing problems of law for the immediate future of mankind." The legal problems presented by such modernistic institutions as the Kinsey report and Prohibition are dealt with just fifteen hundred pages removed from the ancient Code of Hammurabi and the Politics of Aristotle.

Volume Three entitled, "Law, Totalitarianism and Democracy" will deal with law in its relationship to contemporary politics and idealogies. The authors, who began collaboration through their association at Harvard University, are eminent in the field of jurisprudence. There is a general introduction to the work by Roscoe Pound.

CROSS-EXAMINATION AND SUMMATION (2d Ed.) by Jules Baer and Simon Balicer. New York: Fallon Law Book Co., pp. x, 576.

This is a new book in the voluminous field of books dealing with jury trial practice. About this the authors say, "(We) are not unaware of the many excellent books written on (this) subject . . . Were it not for the need and demand . . . for a more logical grouping of the rules relating to the

examination of witnesses . . . and for an exposition of these rules as applied in actual practice, there would be no excuse for this work." The order which the authors adopt is the order of a trial. Beginning with the impaneling of the jury, the discussion continues through the opening address, the order of proof, direct examination, the law and practice of cross-examination, re-examination, summation and charge to the jury. Included is a chapter on expert testimony and a chapter, consuming over one-quarter of the book, devoted to summations in frequently litigated cases. The volume is printed in large, very readable type and New York citations (as well as other jurisdictions) are abundantly given on most points.

The authors are members of the New York bar. Mr. Balicer is co-author of "How To Prove A Prima Facie Case" and "How To Take An Appeal."

THE SUCCESSFUL PRACTICE OF LAW by John Evarts Tracy. New York: Prentice-Hall, Inc., pp. vii, 466.

The author after twenty-six years of successful private practice, first delivered the material dealt with in this book in a series of lectures before the graduating class at the University of Michigan law school. The substance of the lectures was later printed in a small volume entitled, "Hints On Entering The Practice Of Law." The material has been considerably expanded in the present work. Beginning with a chapter on "catching the hare" (obtaining clients), the author offers hints on "How to hold clients," "How to handle conferences with clients," the fixing of fees, drafting legal instruments, searching titles, conducting an office, preparing and trying cases. In Part Two, the author offers suggestions to the brave young attorney who has decided to make his way alone. Here, he discusses choosing a location for an office and the setting up of an office, the latter including such matters as price and type of furniture to be purchased, supplies needed, selecting a library, accounts, dockets and diaries to be kept, the employment and management of a secretary. The book is written in a highly informal manner and

throughout, in addition to a treatment of more weighty matters, are sprinkled innumerable practical hints on matters too mundane to be included in a law school curriculum, which yet must daily confront the young attorney. The last ninety pages contain a complete transcript of testimony in an actual case with occasional comments by the author on the conduct of the case and the strategy of the trial attorneys.